

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 189.

**WILLIAM S. TEVIS, WILLIAM H. MCKITTRICK, THE
PACIFIC SURETY COMPANY, AND THE UNITED
SURETY COMPANY, PLAINTIFFS IN ERROR,**

vs.

JEPP RYAN, THOMAS C. RYAN, AND E. B. RYAN.

**IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF
ARIZONA.**

FILED FEBRUARY 12, 1912.

(23,053)

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1 . In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS and W. H. MCKITTRICK, Appellants,
vs.
JEPP RYAN, T. C. RYAN, and E. B. RYAN, Appellees.

On Appeal from the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

Ben Goodrich, Esq., A. C. Baker, Esq., and Charles Bowman, Esq., Attorneys for Appellants.

Eugene S. Ives, Esq., George H. Neale, Esq., and Fred Sutter, Esq., of the firm of Neale & Sutter, and J. T. Kingsbury, Esq., Attorneys for Appellees.

Be it remembered that on to-wit: the fifth day of August, 1909, came the appellants in the above entitled cause, by their attorneys, and filed in the clerk's office of said Supreme Court, in said entitled cause, a certain Judgment Roll in words and figures following, to-wit:

2 In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs,
vs.
THE WESTERN COMPANY, a Corporation; W. S. TEVIS and W. H. MCKITTRICK, Defendants.

Complaint.

The plaintiffs above named complains of the defendants above named and for cause of action allege:

I.

The Western Company is now and at all times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of California.

II.

That the Turquoise Copper Mining & Smelting Company is now and at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Territory of Arizona.

III.

That on and prior to the 29th day of November, 1902, and thereafter, until divested of its title, as hereinafter alleged, the said

Turquoise Copper Mining & Smelting Company was the owner of all those certain mining claims situated in Cochise County, Territory of Arizona, particularly known and described, as follows, to-wit:

3 The Tom Scott patented Mine, recorded in Book 12 of Deeds of Mines, at page 73;

The Mason, the Location Notice of which is recorded in Book 11, Record of Mines, page 620;

The Tip Top, Location Notice of which is recorded in Book 11, Record of Mines, page 620;

The San Juan, the Location Notice of which is of record in Book 29, Records of Mines, at page 468;

The Ann, the Location Notice of which is recorded in Book 14, Records of Mines, at page 485;

The Santiago, the Location Notice of which is of record in Book 15, Records of Mines, page 153;

The West Side, the Location Notice of which is of record in Book 15, Records of Mines, page 243;

The Tip Top #2, Location Notice of which is of record in Book 12, Records of Mines, page 126;

The Gladys, the Location Notice of which is of record in Book 15, Records of Mines, page 219;

An undivided 1/3 interest in the Orange, the Location Notice of which is of record in Book 19, Record of Mines, page 173;

The Ant, the Location Notice of which is of record in Book 19, Records of Mines, page 171;

The Kohinoor, the Location Notice of which is of record in Book 19, Records of Mines, page 168;

4 The Internation, the Location Notice of which is of record in Book 19, Record of Mines, page 170, Turquoise Mining District.

IV.

That prior to the said 29th day of November, 1902, the capital stock of said corporation, was divided into 100,000 shares of the par value of \$10.00 each, and at all said times four-sevenths of the total capital stock of said Corporation was owned and controlled by plaintiffs and three-sevenths thereof was owned and controlled by defendants, W. S. Tevis and W. H. McKittrick.

V.

That on and prior to the 29th day of November, 1902, the said Turquoise Copper Mining & Smelting Company owed one T. P. McPherson, of Omaha, Nebraska, the sum of \$25,532.00, for which sum said McPherson had obtained a judgment against said Corporation in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and said Corporation was also without funds with which to continue the development of its properties.

That at said time the defendants, Tevis and McKittrick, were persons of large means and had a large acquaintance with other

persons of large means and ready money, which fact said Tevis and McKittrick communicated to plaintiffs, and they also represented that owing to their financial standing and acquaintance they could easily interest other persons in said Company and secure the money needed by said Company to pay off said judgment and to continue said development by the sale of stock, provided that they, the said defendants, were placed in control of said Corporation, and a
5 portion of the stock of said company was placed in the treasury of said Company for sale, and the said defendants then and there promised that if they were so placed in control of such Corporation and the said capital stock of said corporation was changed to 1,000,000 shares of the par value of \$1.00 each and 240,000 shares thereof placed in the treasury of said Company to be sold, that they would proceed at once to sell enough of said stock to pay off said judgment; and by means of said representations and pretenses and promises aforesaid, the said defendants then and there induced these plaintiffs to enter into an agreement with said defendants in words and figures following to-wit:

"This agreement made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part and Jepp Ryan, T. C. Ryan and E. B. Ryan, of Leavenworth, Kansas, parties of the second part

"Witnesseth: That whereas the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a Corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and whereas, the parties of the first part now own and control three-sevenths of the capital stock of the said Corporation, and the parties of the second part, four-sevenths of the said capital stock thereof, and whereas the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said Corporation and thereby obtain the full management of the affairs of the said Corporation.

"Now, Therefore, in consideration of, that the capital stock of the said Corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said Company to be sold in whole or in part by the said parties of the first part at such price or prices as the Board of Directors of said Corporation may be advisable; and the moneys received from such sale or sales, shall be used as follows:

First. To pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said Corporation in the amount of about \$25,532.47 Dollars.

6 Second. To use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this Company; the parties of the second part hereby agree to and with the parties of the first part that the officers in the said Corporation now representing the interest of the parties of the second part shall resign from said office or offices and allow the parties of the

first part to appoint or elect such officers in their place and stead as they may desire; said second parties agree to give the parties of the first part as their interest in the said Company a total of \$280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion, 279,500 shares of capital stock of said Company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties and 99,000 shares to the parties of the second part. Said 200,000 shares shall be issued to W. H. Mc'Kittrick, as trustee, for the parties hereto. All the parties hereto agree to use their best endeavors to sell as much of the said last mentioned shares as possible at not less than par value and the proceeds of any such sales of said lot of stock shall be divided pro rata among the parties hereto until they have been fully reimbursed for the money they now have expended on this property, amounting to about \$160,000, when the remaining shares shall be divided equally among them according to their respective interests in the ratio aforesaid.

It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this Company until the block of 200,000 held in trust for all shares have been sold or apportioned as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this Company excepting the expense of selling the stock held in trust for the parties hereto.

The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract, should they fail to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of parties of the first part to do any and all things herein required of them, then the interests of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis not being present upon the signing hereof that ten days' time be allowed him in which to sign and ratify same. Should he fail or refuse to so do within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto.

7 All erasures and changes and interlineations were made prior to the signing of this instrument.

Witness our hands the day and year first above mentioned.

WILLIAM S. TEVIS,

W. H. Mc'KITTRICK,

(Parties of the First Part.)

JEPP RYAN,

THOMAS C. RYAN,

E. B. RYAN,

(Parties of the Second Part.)"

which agreement was duly executed by all the parties thereto.

VI.

That accordingly after the execution of said agreement, the capital stock of said Corporation was changed from 100,000 shares of the par value of \$10 each to 1,000,000 shares of the par value of \$1.00 each and 240,000 shares thereof were placed in the control and keeping of the said Tevis and Mc'Kittrick and in the treasury of said Company for sale, and the other stock of said Corporation was divided in the manner agreed in said agreement aforesaid, and early in the year 1903 plaintiffs resigned as Directors of said Corporation and placed the said defendants, Tevis and Mc'Kittrick in control of said Corporation by appointing and electing three other directors who were suggested by said defendants, Tevis and Mc'Kittrick and were at all times controlled by and in the interest of said Tevis and Mc'Kittrick and the said defendants, Tevis and Mc'Kittrick have owned and controlled a majority of the capital stock of said Corporation and by reason thereof have selected directors of said Corporation who would act and who have acted in entire subservience to Tevis and Mc'Kittrick and plaintiffs have had no voice therein.

8

VII.

That on or about the 1st day of April, 1904, the said defendants, Tevis and Mc'Kittrick, sold the said 240,000 shares of the said capital stock of the said Corporation, being the said 240,000 shares of said capital stock placed in the treasury according to said agreement as aforesaid to some of their intimate friends for less than \$2,500, and thereby placed it out of their power to comply with said contract or to sell said stock and out of the proceeds to pay the said judgment in favor of the said T. B. Mc'Pherson aforesaid, which said sale was without the consent of the plaintiffs.

That the moneys so realized by the sale of the said stock as aforesaid were not nor was any part thereof used toward the payment of the said judgment aforesaid and that all of said moneys were used in and about the operating expenses of said Company, and that said judgment in favor of the said T. B. Mc'Pherson aforesaid was paid by money furnished by the said W. S. Tevis individually, for which money said Tevis took the notes of the said Turquoise Copper Mining and Smelting Company, and as the interest upon the said notes became due from time to time, other notes were given to said Tevis to represent the interest upon said indebtedness.

That on or about April 1st, 1905, said Tevis assigned said notes, the same aggregating at that time, over \$44,000.00 to the said Western Company, a corporation:

That said Western Company is a corporation, the stock of which is owned entirely by the said W. S. Tevis and by members of his family and is entirely controlled by him and has been at
9 all times, and that the said Western Company took said notes with full notice and knowledge of all the circumstances herein alleged.

VIII.

That on or about June 1st, 1905, said Western Company commenced an action in the Superior Court of the County of Kern, State of California, upon the said notes so given as aforesaid, and on or about the 1st day of July, 1905, judgment was duly given and entered in the said Superior Court of the County of Kern, State of California, in favor of said Western Company, and against said Turquoise Copper Mining and Smelting Company for the sum of \$44,549.43.

That thereafter, to wit, on or about the 1st day of July, 1905, action was commenced by the said Western Company in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, against said Turquoise Copper Mining and Smelting Company upon the said judgment theretofore obtained in the said Superior Court in the County of Kern, State of California, and upon the 20th day of July, 1905, judgment was duly entered and rendered in the said District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, in favor of said Western Company and against said Turquoise Copper Mining and Smelting Company for the sum of \$44,449.43, together with \$21.35 costs, and that execution thereunder was duly issued and that all the real property and mining claims hereinbefore described was duly levied upon and sold under said execution to said Western Company and that the same has not been redeemed.

10

IX.

That said directors of said Turquoise Copper Mining and Smelting Company controlled by said Tevis and McKittrick aforesaid allowed the said McKittrick a salary of \$350.00 per month as secretary of said corporation, and also allowed the said William H. McKittrick to recover a judgment in the said District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, on the 20th day of July, 1905, for the sum of \$9,975.00 and \$23.00 costs, on account of such alleged salary as secretary of said company; the same being a part of the operating expenses of said company, and execution was duly issued out of said Court under said judgment, and the said mining property hereinbefore described was, on the 4th day of August, 1905, sold, entered and by virtue of said execution, to the said Western Company aforesaid.

X.

That prior to the commencement of this action, plaintiffs demanded of said defendants that they be placed in the same position that they were in at the time and prior to the making of the contract between the plaintiffs and Tevis and McKittrick, hereinbefore set out, and offered to pay four-sevenths of the amount of the said judgment in favor of the said T. B. McPherson, together with accrued interest upon the conveyance to them of a four-sevenths interest in the said mining property described herein; but to make

such conveyance defendants refused, and still refuse. And plaintiffs also offered to pay for said judgment upon the said McPherson indebtedness with interest within ninety days after the re-
 11 conveyance of the said property to the Turquoise Copper Mining Company and the re-conveyance to these plaintiffs of four-sevenths of the capital stock of said Corporation, provided that said plaintiffs be allowed at the same time to select the directors of the said Corporation and to assume control thereof, but to accede to any of said demands defendants refused, and still refuse.

Wherefore, plaintiffs pray judgment that the defendants, The Western Company, be declared to hold the said mining property hereinbefore described, in trust and that the plaintiffs be decreed to have a four-sevenths interest therein, and that the said defendants, The Western Company, be required to convey to the said plaintiffs a four-sevenths interest in the said mining property upon the payment by said plaintiffs to said Western Company of a four-sevenths part of the said McPherson judgment, with interest, and also that plaintiffs as near as may be, placed in the same position in relation to said defendants and to said property as they were at the time of the making of the agreement between plaintiffs and defendants, Tevis and McKittrick, on the 29th day of November, 1902, and for such other and further relief as may be meet and equitable and for costs.

M. W. CONKLING,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Jepp Ryan, having been first duly sworn deposes and says: That he is one of the defendants in the above named action; that he has read the foregoing complaint and knows the contents thereof
 12 to be true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

JEPP RYAN.

Subscribed and sworn to before me this 12th day of November, 1906.

[SEAL.] M. W. CONKLING,
*Notary Public in and for the County
 of Los Angeles, State of California.*

(Title Court and Cause.)

TERRITORY OF ARIZONA,
Cochise County, ss:

James Reilly being first duly sworn, deposes and says: that he is the attorney for the plaintiffs in the above and foregoing entitled suit.

That the defendants W. S. Tevis, and W. H. McKittrick are and

each of them is a non resident of the Territory of Arizona; that they and each of them are absent from said Territory and cannot be found therein. That said defendants and each of them reside in the Town of Bakersfield Kern County, State of California.

And affiant further on oath deposes and says; that the defendant The Western Company is a corporation, incorporated under and by virtue of the laws of the State of California, and has and owns property in the County of Cochise, Territory of Arizona, but has
13 no legally appointed or constituted agent in said Territory of Arizona on whom process can or may be served. And that said Western Company has its principal office in and residence at the Town of Bakersfield, Kern County, State of California.

JAMES REILLY.

Subscribed and sworn to before me this 12th day of November, A. D. 1907.

[SEAL.]

GEORGE WILCOX,
Clerk of Dist. Court,
By P. MICHELINA, Deputy.

(Title Court and Cause.)

Affidavit of Mailing Copies of Summons and Complaint.

TERRITORY OF ARIZONA,
Cochise County, ss:

James Reilly being duly Sworn Deposes, That he is one of the Attorneys for the plaintiffs in The above entitled Action. That on the 13th. day of November 1907, he Deposited in the post office at Tombstone, Cochise County, Arizona, a True copy of the Summons in the above entitled Action attached to a true Copy of the Complaint in said action, both inclosed in a sealed envelope Post paid and Addressed, "The Western Company, a corporation Bakersfield, Kern County, State of California."

And Affiant further, on oath Deposes, That on the same
14 day, 13th of November 1907, he Deposited in the post Office at Tombstone, Cochise County, Arizona another True Copy of the Summons in the above entitled action attached to a true Copy of the Complaint in said action, both inclosed in an envelope, Sealed, post paid and addressed, "W. S. Tevis, Bakersfield, Kern County, State of California."

And affiant further, on oath deposes, That on the 13th day of November 1907, another true Copy of the Summons in the above entitled action attached to a true copy of the complaint in said action both inclosed in an envelope, sealed, post paid and addressed W. H. McKittrick, Bakersfield, Kern County, State of California, and affiant further on oath Deposes, That there is a regular Communication by United States Mail between the said city of Tombstone and the said Town of Bakersfield.

JAMES REILLY.

Subscribed and sworn to before me This 13th day of November 1907.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy*.

(Title Court and Cause.)

Comes now the defendant, The Western Company, a corporation, and demurs to the plaintiffs' complaint upon the ground that it appears upon the face thereof, that the said complaint does not state facts sufficient to constitute a cause of action.

H. L. PACKARD,
S. L. PATTEE,
*Attorneys for the Western Company,
a Corporation, Defendant.*

15 (Title Court and Cause.)

Now comes the defendants, W. S. Tevis and W. H. McKittrick appearing specially for the sole and only purpose of objecting to the jurisdiction of the court over said defendants or either of them, and alleges that no service of summons has been made upon said defendants or either of them within the Territory of Arizona, and that the plaintiffs have attempted to serve the summons upon the said defendants by publication thereof in a newspaper published in Cochise County, Arizona, and by mailing a copy of the summons and complaint to each of the said defendants, addressed to them at Bak-ersfield, California, and upon such allegations and the record and all papers filed herein, object to the jurisdiction of the court, on the ground that under the statutes of Arizona, and the constitution of the United States, jurisdiction cannot be obtained over the defendants or either of them, by the service of the summons by publication.

Wherefore, said defendants pray that their objection to the jurisdiction be allowed, and that it be ordered and determined that this court has no jurisdiction over the said defendants or either of them.

Dated, Tucson, Arizona, November 25th, 1907.

EUGENE S. IVES,
*Attorney for Said Defendants, Appearing
Specially for the Sole and Exclusive
Purpose of Objecting to the Jurisdic-
tion of the Court.*

16 TERRITORY OF ARIZONA,
Cochise County, Office of the Sheriff:

I hereby certify, That I have the Summons hereto Attached, To wit, the Summons in the case of Jepp Ryan, T. C. Ryan, and E. B. Ryan, vs. The Western Company (A Corporation) W. S. Tevis and W. H. McKittrick, by causing the same to be Published

in the Tombstone Prospector, a Daily Newspaper, published in the City of Tombstone Cochise County, Arizona, Once each week and every week for more than Four successive Weeks. To wit, On the 13th, 20th and 27th of November, and the 4th and 11th of December of the year 1907. And I attach hereto a copy of said Publication.

And I further certify that — served the said summons, on the Defendant W. H. McKittrick personally, by delivering to him personally, at Tombstone Cochise County, Arizona, on the 7th day of December, 1907, a True copy of said Summons attached to a true copy of the complaint in said Action. Dated Dec. 12th 1907.

JOHN F. WHITE, *Sheriff*,
A. A. HOPKINS, *Deputy*.

Fees

15.00 Publication.

1.80 Returning summons.

1.80 Personal service on McKittrick.

18.60.

Summons.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

JEPP RYAN, T. C. RYAN, AND E. B. RYAN, Plaintiffs,

17

vs.

THE WESTERN COMPANY (a Corporation), W. S. TEVIS AND
W. H. MCKITTRICK, Defendants.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and the Complaint Filed in the said County of Cochise in the Office of the Clerk of said District Court.

The Territory of Arizona sends Greeting to The Western Company (a Corporation), W. S. Tevis and W. H. McKittrick:

You are hereby required to appear in the action brought against you by the above named plaintiff in the district court of the second judicial district of the territory of Arizona, in and for the county of Cochise and to answer the complaint filed therein within twenty days (exclusive of the day of service), after the service on you of this summons (if served within the county; otherwise within thirty days), or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the seal of the District Court of the second judicial district of the Territory of Arizona, in and for the county of Cochise, this 12th day of November, in the year of our Lord one thousand nine hundred and seven.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PEDRO MICHELINA,
Deputy Clerk.

First publication November 13th, 1907.

18

(Title Court and Cause.)

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and the Complaint Filed in the said County of Cochise, in the Office of the Clerk of said District Court.

The Territory of Arizona sends Greeting To the Western Company, a Corporation, W. S. Tevis, and W. H. McKittrick:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise and to answer the complaint filed therein within twenty days (exclusive of the day of service), after the service on you of this summons (if served within the county; otherwise within thirty days), or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to —

Given under my hand and the Seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 12th day of November in the year of our Lord one thousand nine hundred and seven.

[SEAL.]

GEO. B. WILCOX, *Clerk*,

By P. MICHELINA,

Deputy Clerk.

19

(Title Court and Cause.)

Demurrer and Answer.

Now come the defendants W. S. Tevis and W. H. McKittrick, and answering for themselves alone and not for their co-defendant, The Western Company, for demurrer say:

That plaintiffs' complaint does not state facts sufficient to constitute a cause of action, against these defendants.

For special demurrer they say, that that portion of Paragraph 5 of plaintiffs' complaint, to the effect that these defendants promised that if they were placed in control of said corporation, and the capital stock of said corporation was changed to one million shares of the par value of one dollar each, and 240,000 shares thereof placed in the treasury of said Company to be sold, that they would proceed to sell enough of said stock to pay off said judgment, is insufficient to constitute a cause of action, against these defendants because these defendants say that said promise did not relate to any existing fact but was a promise simply that they would do something in the future, and does not constitute an estoppel.

For further special exception to plaintiffs' complaint, these defendants allege that it appears upon the face of the complaint itself that the action for which plaintiffs pray relief is based upon the ground of fraud, and that said action was not commenced or prosecuted within one year after the cause of action accrued, and is

barred by the statute of one year's limitation, Subdivision 5 Paragraph 2949 of the Revised Statutes of Arizona 1901 as amended by Act No. 16, approved March 12th, 1903, Session Laws of 1903.

20 Wherefore, they pray that that portion of Paragraph 5 be stricken out as irrelevant and immaterial.

And for further special demurrer these defendants say, that there is no allegation in the complaint that plaintiffs relied upon said promise, or were induced thereby, to enter into the agreement mentioned in plaintiffs' complaint, and that they had no right to rely upon promises of that character.

Further answering in this behalf these defendants say, that said plaintiffs ought not to have and maintain their aforesaid action thereof against them, because they say that their pretended cause of action is based upon the ground of fraud and was not commenced nor prosecuted within one year after the pretended cause of action accrued and is barred by Subdivision 5 Paragraph 2949 of the Revised Statutes of Arizona for 1901 as amended by Act No. 16, Approved March 12th, 1903, Session Laws 1903.

Further answering these defendants admit the allegations contained in Paragraphs 1, 2, 3, 4 and that portion of Paragraph 5 alleging indebtedness to T. P. McPherson in the sum of \$25,532.00, and that said McPherson had obtained a judgment lien against said corporation in this court, and that the corporation was without funds with which to continue the development of its properties; but these defendants deny that they ever represented to plaintiffs, or either of them, that they were persons of large means and had a large acquaintance with other persons of large means and ready money, and they deny that they ever represented to plaintiffs, or either of

21 them, that owing to their financial standing and acquaintance they could easily interest other persons in said Company and secure the money needed by said Company to pay off said judgment and continue the development by the sale of stock provided they were placed in control of the corporation, and a portion of the stock of the Company placed in the treasury of the Company for sale; and they deny that they then and there promised, or at any time promised that if they were so placed in control of said corporation and the capital stock of said corporation was changed to 1,000,000 shares of the par value of \$1.00 each and 240,000 shares thereof placed in the treasury of said Company to be sold that they would proceed to sell enough to pay off said judgment lien; and they further deny that by means of said representations, pretenses or promises, or by reason of any other means, the said defendants then and there induced these plaintiffs to enter into said agreement set out in Paragraph 5 of plaintiffs' complaint. On the contrary these defendants allege, that if anything was said in regard to the sale of said stock, that it was a mere expression of opinion that they would probably be able to sell same and use their best endeavors to sell sufficient stock to pay off said judgment. They also allege that said agreement set up in Paragraph 5 of plaintiffs' complaint was entered

into at the solicitation of the plaintiffs, and under the following circumstances.

That on or about the 29th of November, 1902, at a meeting of the stockholders of the Turquoise Copper Mining & Smelting Company, at Wilcox, Arizona plaintiff Jepp Ryan, his co-plaintiffs being then and there present and hearing the statement, stated to defendant

McKittrick the fact that McPherson had a judgment against 22 the Company for about the amount named in plaintiffs' complaint, and that he was fearful that he (McPherson) would enforce the judgment lien and secure the title to the property mentioned in plaintiffs' complaint in himself, and asked defendant to help him to devise some scheme by which the Company's property could be saved from the McPherson judgment lien. Thereupon, after further conversation on the subject, the scheme was devised mentioned in the agreement and at the solicitation of plaintiffs themselves and not at the solicitation or on the suggestion of these defendants.

These defendants deny that the directors chosen by them, as allege in Paragraph 6 of plaintiffs' complaint, have acted in subservience to these defendants, and deny all fraudulent implications, but admit that they have acted in harmony with them.

Defendants admit that they sold 240,000 shares of the capital stock of said corporation, as alleged in Paragraph 7 of plaintiffs' complaint, but deny that they sold the same to intimate friends or for a less sum than \$9,560.00, and they allege in this regard, that said stock was sold in strict accordance with the terms of the agreement mentioned in plaintiffs' complaint and at the price fixed by the Board of Directors of said corporation, and that plaintiffs were notified of the same and acquiesced therein after full knowledge of all the facts. That of the 240,000 shares of stock, all of which except 208,000 shares was sold for more than 20c. per share, and as to the 208,000 shares of stock, plaintiffs were duly informed 23 of the necessity for the sale of the same, which was offered to them prior to it being offered for sale to any one else, and were requested to make a bid on the same in order to raise money to pay off the judgment and the debts of the Company, and that plaintiffs absolutely ignored the communication informing them of the fact.

Defendants further allege that all of the stockholders except plaintiffs themselves agreed to assess themselves five cents on the dollar of every share of stock in said Company that they held in order to redeem the property against the McPherson judgment lien and to pay off other indebtedness of the Company, and solicited and insisted that plaintiffs should pay a like assessment on the stock held by them, and that they refused so to do; that the payment of said assessment of five cents per share would have raised a sufficient amount of money to have saved the property from the sale under the McPherson judgment lien and pay off the indebtedness of the Company.

These defendants allege that plaintiffs were notified of every meeting of the stockholders, and were furnished with a copy of

the minutes of every meeting of the stockholders of the Company, and of every meeting of the directors of the Company, and had as much knowledge of the condition of affairs and of the financial condition of the Company and of the sales of stock, and of the proceedings of the Company in every respect as these defendants had; and they deny that the sale of said stock was made without the consent of plaintiffs.

These defendants admit that the moneys realized from the sale of stock was not used towards the payment of the McPherson judgment lien, but allege that said moneys were used, a greater
24 part if not all, in current operating expenses of the Company and in payment of the debts of the Company to prevent the property of the Company from being enveloped with mechanics, and laborers' liens and attachments, — all of which plaintiffs were fully advised.

They deny that the McPherson judgment lien was paid by W. S. Tevis individually, but allege that said Tevis loaned the Company the money with which said judgment lien was satisfied and for which said Tevis took notes, and that it was impossible to procure the money from any other source than said Tevis after repeated applications to other parties, and that said Tevis loaned said Company the money to pay said McPherson judgment lien in order that he might save the Company property from being sold and all of the property of the Company lost.

These defendants deny that the stock of said Western Company is entirely controlled by said Tevis, or that it has ever been controlled by him, and deny that said Western Company took said notes with full notice or knowledge of the circumstances herein alleged in plaintiffs' complaint.

These defendants deny that the directors of the Turquoise Copper Mining & Smelting Company allowed defendant McKittrick a salary of \$350.00 per month as Secretary of said corporation, or allowed him any salary for services as Secretary, and deny that they allowed said McKittrick to recover judgment in the District Court of Cochise County for \$9,975.00 and \$23.00 costs on account of salary as Secretary of said Company. On the contrary these defendants allege that the sum of \$250.00 per month and no more
25 was allowed by the Directors of said Company to said McKittrick for his services as General Manager of the corporation and of the operation of the same, and that the judgment rendered in his favor was rendered on account of services as General Manager and not as Secretary.

These defendants allege that prior to the time the demand mentioned in Paragraph 10 of plaintiffs' complaint was made, that the property of the said Turquoise Copper Mining & Smelting Company had been sold under the Western Company's judgment; that the judgment of the Western Company was made up of not only the original indebtedness of the McPherson judgment lien but of other large indebtedness which had accumulated against said company, of all which plaintiffs were fully advised at the time the judgment was rendered in favor of the Western Company and before the sale under

the judgment of the Western Company and long before the time for redemption under the Western Company's sale had expired.

These defendants allege that said offer to pay four-sevenths of the McPherson indebtedness with interest, is not made in good faith, because these defendants say that it is predicated upon a reconveyance of the property of the Company and four-sevenths of the capital stock of the corporation, after which reconveyance they claim ninety days in which to make payment, and there is no evidence that they are any more ready, able or willing to pay after the reconveyance than they were before the sale under the Western Company's judgment, at which time they had ample opportunity to pay off said sum if they had been so disposed and which it was their duty to do before the time for redemption had expired.

26 Wherefore these defendants pray that plaintiffs recover nothing by their suit; that their complaint be dismissed; that these defendants go hence without day and recover of plaintiffs their costs in this behalf incurred and expended, and for such other and further relief as to the court may seem meet, proper and equitable in the premises.

CHARLES BOWMAN,

BEN GOODRICH,

*Attorneys for Defendants, W. S. Tevis
and W. H. McKittrick.*

TERRITORY OF ARIZONA,
County of Cochise, ss:

W. H. McKittrick being first duly sworn, deposes and says: that he is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true in substance and in fact.

W. H. MCKITTRICK.

Subscribed and sworn to before me this 7th day of December, 1907.

[SEAL.]

E. G. SHEPARD,

Notary Public in and for Cochise County, Arizona.

My commission expires February 20th, 1911.

(Title Court and Cause.)

Amended Complaint.

Now comes plaintiffs above named and after service thereof on defendants, file this their amended complaint, and for cause of action against the above named defendants, allege:

27

I.

That the defendant the Western Company, is and at all the times hereinafter mentioned was a corporation organized and existing

under and by virtue of the laws of the State of California, and the defendants W. S. Tevis and W. H. McKittrick are both non-residents of the Territory of Arizona and reside in the state of California.

II.

That the Turquoise Copper Mining and Smelting Company hereinafter mentioned is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the Territory of Arizona.

III.

That on and prior to the 29th day of November, 1902, and thereafter until divested of its title, as hereinafter set out, the said Turquoise Copper Mining and Smelting Company was the owner of all those certain mines and mining claims situate in the Turquoise Mining District, Cochise County, Territory of Arizona, particularly known and described as follows, to-wit:

The "Tom Scott" a patented mine, the patent for which is recorded in Book 12 of Deeds of Mines, at page 73, in the office of the County Recorder of the aforesaid Cochise County.

The "Maxon" mining claim, the location notice of which is recorded in Book 11, of Records of Mines, at page 620, in the same recorder's office.

The "Tip Top" mining claim, the location notice of which is recorded in Book 11, of Records of Mines, at page 620, in the same office.

28 The "San Juan" mining claim, the location notice of which is recorded in Book 29 of Records of Mines, at page 468, in the same office.

The "Ann" mining claim, the location notice of which is recorded in Book 14, Records of Mines, at page 485, in the same office.

The "Santiago" mining claim, the location notice of which is recorded in Book 15, Records of Mines, at page 153, in the same office.

The "West Side" mining claim, the location notice of which is recorded in Book 11, of Records of Mines, at page 243 in the same office.

The "Tip Top No. 2" mining claim, the location notice of which is recorded in Book 12, Records of Mines, at page 126, in the same office.

The "Gladis" mining claim, the location notice of which is recorded in Book 15 of Records of Mines, at page 219, in the same office.

An undivided one-third interest in the "Orange" mining claim, and an undivided one-third interest in the "Ant" mining claim, and an undivided one-third interest in the "Kohinoor" mining claim, and, an undivided one-third interest in the "International" mining claim; the location notices of all these four claims are recorded in Book 19 of Records of Mines, at pages 173, 171, 168, and 170, respectively.

IV.

That on and prior to the aforesaid 29th day of November, 1902, the capital stock of the said Turquoise Copper Mining and Smelting Company was divided into One Hundred Thousand Shares, (100,000), of the par value of Ten Dollars (\$10.00) each, and four-sevenths ($\frac{4}{7}$), of all of said capital stock was owned and controlled by the plaintiffs, and three sevenths ($\frac{3}{7}$) of all of said stock was owned and controlled by the defendants, W. S. Tevis and W. H. McKittrick.

V.

That prior to the aforesaid 29th day of November, 1902, and on or about the 31st day of July, 1902, the Sheriff of Cochise County, Territory of Arizona, by virtue of an execution issued out of this Honorable Court, in the case of S. H. Bryant and wife against the aforesaid Turquoise Copper Mining and Smelting Company No. 3017 sold at public auction to one Thomas B. McPherson all of the mines and mining claims in paragraph 3 hereinbefore mentioned and described, for the sum of Twenty-three Thousand six hundred and forty one dollars and nineteen cents (\$23,641.19), and the amount required to redeem said property from said sale was the sum of \$25,252.60.

VI.

That at the time of the said sale, to-wit, on the 31st day of July, 1902, and from that time continuously to and including the 29th day of November, 1902, the said Turquoise Copper Mining and Smelting Company had no funds nor any other means, except by mortgage of the property hereinbefore, in paragraph 3, described, of raising the money to redeem its said property from the sheriff's sale hereinbefore set out, and these plaintiffs had no funds wherewith to make such redemption, nor other means of raising the money necessary therefor, and the defendants, W. S. Tevis and W. H. McKittrick, were the owners of large and abundant means in money and property wherewith to make said redemption and develop the said property, all of which was well known to the parties who made the contract hereinafter set forth, and to each of them.

And the defendants, W. S. Tevis and W. H. McKittrick represented to plaintiffs that they desired to be placed in absolute control of the said Turquoise Copper Mining and Smelting Company and of its property, without any interference of plaintiffs in the business of said corporation, and if so placed in control of said corporation and its management, they, through their superior financial ability and that of their friends and associates, could and would redeem the property of the said corporation from the sheriff's sale made on July 31st, 1902, and sell sufficient of the stock of the said corporation to pay said redemption money and to raise sufficient money to prospect, work and develop said property in the interest of all the parties concerned.

That thereupon, and on or about the 29th day of November, 1902, the plaintiffs on the one part and the defendants, Tevis and McKittrick on the other part, entered into a certain contract and agreement, in words and figures following- to-wit:

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

Witnesseth: That, whereas the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona and, whereas, the parties of the first part now own and
31 control three-sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and, whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

Now, therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization of One Million Shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the Board of Directors of said Corporation may deem advisable, and the monies received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against said corporation, in the amount of about \$25,532.47 *Dollars*. Second, to use the next \$20,000 received from the sale of said stock, to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part that the officers in the said corporation now representing the interest of the parties of the second part, shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully re-imbursed for the money

they now have expended upon this property, amounting to about \$160,000, when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.

It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties

32 of the first part shall have a term of two years in which to comply with all the requirements of this contract, should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify same. Should he fail or refuse to do so within the period above mentioned then this instrument shall be null and void, in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

Witness our hands the day and year first above mentioned.

WILLIAM S. TEVIS,

W. H. MCKITTRICK,

Parties of the First Part.

JEPP RYAN,

THOMAS C. RYAN,

E. B. RYAN,

Parties of the Second Part.

Which contract and agreement was duly executed by each and every one of the parties thereto.

VII.

That after making of said contract these plaintiffs performed all the terms thereof to be by them performed, and they and their friends constituting a majority of the Board of Directors of the said Turquoise Copper Mining and Smelting Company, resigned as such directors, and from that time plaintiffs ceased to take any part in the management of the affairs of said corporation, and the defendants Tevis and McKittrick, who were then the remaining directors of said corporation, took complete control of all the business of said corporation, and of the books, papers and records

33 thereof, and took all said books, papers and records to Bakersfield, Kern County, State of California, where said de-

defendants then resided, from Willcox, Cochise County, Arizona, at which place the principal office of said corporation had been theretofore placed, and where all the business of said corporation had, prior to the said 29th day of November, 1902, been transacted.

VIII.

That plaintiffs are informed and believe and therefore allege, that said defendants, Tevis and McKittrick, proceeded to conduct all the business of the said Turquoise Copper Mining and Smelting Company at the said town of Bakersfield, by causing to be elected or by appointing other directors, and a secretary of their own choosing, and prior to the 1st day of February, 1903, with their own money or with that of one of them, redeemed the property of the said corporation from the sheriff's sale mentioned in paragraph 5 of this complaint, by paying to Thomas B. McPherson the sum of \$25,252.60 and causing the said corporation, under their management and control, to issue to the defendant, W. S. Tevis, the negotiable promissory note of the said corporation, for the sum of \$30,000 with interest thereon at ten per cent per annum, compounded semiannually.

That plaintiffs are further informed and believe, and therefore allege that the said defendants, Tevis and McKittrick, caused the articles of incorporation of the said Turquoise Copper Mining and Smelting Company, to be amended so as to change the capital stock of said corporation from 100,000 shares at the par value of \$10.00 per share, to One Million Shares of the par value of one Dollar per share, as agreed upon in the contract and agreement
34 hereinbefore set out, and issued stock accordingly, and delivered to these plaintiffs certificates of said stock so changed, for 279,500 shares.

That plaintiffs are further informed and believe and therefore allege, that the said defendants, Tevis and McKittrick continued to manage and control the business of the said Turquoise Copper Mining and Smelting Company, and on the — day of March, 1904, sold thirty two thousand shares of the two hundred and forty thousand shares placed in the treasury of the Corporation as specified in the above contract and agreement, for twenty-five cents per share, and received therefor the sum of \$8,000; and thereafter and on or about the — day of June, 1904, sold or gave to themselves or friends the remaining 208,000 shares of the said treasury stock for the pretended price of three-fourths ($\frac{3}{4}$) of one cent per share.

That plaintiffs are further informed and believe, and therefore allege, that the said defendants, Tevis and McKittrick, while having the sole control and management of the said Turquoise Copper Mining and Smelting Company, and between the 29th day of November, 1902, and the 15th day of April, 1905, caused said corporation to issue to the said defendant W. S. Tevis, its five other negotiable promissory notes aggregating about \$9,300, with interest at ten per cent per annum compounded semi-annually, all which promissory notes together with the promissory note for \$30,000,

hereinbefore set out the said defendant, W. S. Tevis, assigned and transferred to the defendant the Western Company, and the said defendants Tevis and McKittrick, thereafter, and on or about 35 the — day of May, 1905, caused the said Western Company to bring and prosecute suit in the Superior Court of Kern County, State of California, against the said Turquoise Copper Mining and Smelting Company, on all said promissory notes; and the said Western Company in said suit obtained a judgment of said Court against the said Turquoise Copper Mining and Smelting Company on the 24th day of May, 1905, for the sum of \$44,078.05. That said defendants Tevis and McKittrick, procured and caused the said Western Company thereafter and on the 20th day of June, 1905, to bring and prosecute suit in this Court, being Case No. 3968 against the said Turquoise Copper Mining and Smelting Company, on the aforesaid judgment of the Superior Court of Kern County, California, and thereafter on July 20th, 1905, the said Western Company in said suit duly obtained a judgment of this Honorable Court against the said Turquoise Copper Mining and Smelting Company for the sum of \$44,449.93 with costs \$21.35; and thereafter the said defendants, Tevis and McKittrick, procured and caused an execution on the last mentioned judgment to be duly issued out of this Court to the sheriff of Cochise County by virtue of which he, the said sheriff, on the 12th day of August, 1905, duly and regularly sold all the mines and mining claims mentioned and described in paragraph III of this complaint, for the sum of \$45,825.30, to the defendant, the Western Company, and thereafter no redemption having been made from said sale, the said sheriff duly executed to the said Western Company, a deed of all said mines and mining claims, on the 11th day of July, 1906.

36 That on the 20th day of June, 1905, the defendant W. H. McKittrick brought suit in this Honorable Court, being No. 3969, against the said Turquoise Copper Mining and Smelting Company for the sum of \$9,975.00 for alleged salary as manager of said Corporation, and obtained a judgment against said Corporation for the sum of \$9,975.00 and \$23.45 costs, on which judgment execution was thereafter duly issued to the sheriff of Cochise County, who thereafter on the 12th day of August, 1905, by virtue of said execution duly sold all the mines and mining claims hereinbefore mentioned and described in paragraph III of this complaint, to the said Western Company, for the sum of \$10,406.00.

IX.

That plaintiffs are informed and believe, and therefore allege that each and every of the judgments and Sheriff's sales, made to the Western Company, were obtained and made after due service of process on the said Turquoise Copper Mining and Smelting Company and after default made thereon by said Corporation, while still under the exclusive control and management of the defendants Tevis and McKittrick, and plaintiffs allege that they had no notice

or knowledge of said judgments or sales or any of them until long after the 12th day of August, 1905.

X.

* That on or about the — day of February, 1905, and on many occasions between the said date, and during the said year of 1905 and particularly in the month of July, 1905, plaintiffs demanded of the said Defendants, Tevis and McKittrick, that they cause plaintiffs to be reinvested with their interest in the properties
37 of the said Turquoise Copper Mining and Smelting Company, the same as, or equivalent to that which plaintiffs had held prior to the making of the contract hereinbefore set out, on or about the 29th day of November 1902, and the defendants failed and refused to comply with said demand.

XI.

Plaintiffs are informed and believe and therefore allege, that on the 29th day of November, 1902, the mines and mining claims hereinbefore in paragraph III mentioned and described were, and ever since have been, and on the 29th day of November, 1904, were and now are, worth the sum of \$230,000.00, and by reason of the conduct and management of the said property and of the business of the said Turquoise Copper Mining and Smelting Company by the said defendants, Tevis and McKittrick as hereinbefore alleged and by reason of the various acts hereinbefore alleged to have been committed, procured and caused to be done or permitted by the said defendants, Tevis and McKittrick, all the said mines and mining claims have been lost to the said Turquoise Copper Mining and Smelting Company and the title thereto vested in the said Western Company and the capital stock of the said Turquoise Copper Mining and Smelting Company has thereby become absolutely worthless and plaintiffs have thereby been injured and damaged in the sum of One Hundred Thousand Dollars.

XII.

That plaintiffs are informed and believe and therefore allege that, the defendants, W. S. Tevis and W. H. McKittrick, managed the business of the Turquoise Copper Mining and Smelting
38 Company as hereinbefore alleged, and cause the title of the said corporation to the Mines and Mining claims in paragraph III, of this complaint described, to be divested out of the said Turquoise Copper Mining and Smelting Company and to be vested in the defendant the The Western Company with the intent and for the purpose of cheating and defrauding these plaintiffs out of their interest in the said Turquoise Copper Mining and Smelting Company and in the said Mines and Mining Claims.

And plaintiffs are further informed and believe and therefore allege, That the defendants, Tevis and McKittrick, by some secret contract, agreement or understanding with the said Western Com-

pany still own and control the title to the said Mining Claims and can if so inclined, cause the said Western Company, to convey to these Plaintiffs the four-sevenths ($\frac{4}{7}$) interest in the said property and mining claims;

That ever since the — day of February, 1905, these plaintiffs have been ready, able and willing to pay to the defendants the Four Sevenths of the sum of \$25,252.60 and legal interest thereon for two years to-wit, the sum of Sixteen Thousand Two Hundred Dollars (\$16,200.00) and are now ready, able and willing to pay that sum into Court for the benefit of the defendants, on condition that the defendants, Tevis and McKittrick, cause the defendant the Western Company to convey to the Plaintiffs an undivided four-sevenths ($\frac{4}{7}$) of the mining claims hereinbefore in paragraph III of this complaint described.

Wherefore plaintiffs pray:

1st. For a judgment of this Honorable Court in favor of Plaintiffs and against the defendants W. S. Tevis and W. H. McKittrick for the sum of one hundred thousand dollars besides the cost of this suit.

2nd. And for such other and further judgment and decree as may appear just in the premises.

JAMES REILLY,
J. KINGSBURY,
Attorneys for Plaintiffs.

(Title Court and Cause.)

Answer of Defendant Western Company.

Comes now the said defendant and answering plaintiff's complaint herein filed, for itself alone and not for its co-defendants, by way of a demurrer alleges:

I.

That said Complaint does not state facts sufficient to constitute a cause of action against said defendants or either of them in this:

The Complaint is based upon alleged fraud of the defendants, Tevis and McKittrick, who are alleged to have made certain representations and promises which induced the making of the agreement pleaded, and the said representations and promises do not in any degree constitute fraud, and are wholly insufficient, and fail entirely to show fraud or deceit, and are but promises to do something in the future, and a mere failure to fulfill a promise is not within the law fraudulent. The representations were merged in the agreement and evidence thereof will not be received because the said agreement as set out in the complaint is definite and certain and does not require extrinsic evidence to explain
40 it.

The Complaint does not show:

That the promises and representations were false; or that the defendants, Tevis and McKittrick knew the same to be false; or

that said defendants made the same with intent to deceive or with intent that plaintiffs should act upon the same; or that plaintiffs did act upon the same in reliance thereupon; or that said plaintiffs suffered injury thereby or that there was or is anything of a confidential or fiduciary relation between plaintiffs and defendants, or between said defendants, Tevis and McKittrick, or either of them, and this defendant.

The Complaint does not allege execution or delivery of the agreement therein set up, the allegations in that behalf being clearly the opinion of the pleader and a conclusion of law; nor does said Complaint show or plead a compliance by said plaintiffs with the conditions on them in said agreement imposed.

The complaint does not allege or show a tender to this defendant of the moneys or any part or portion thereof expended by it in the purchase of the property as in the Complaint described.

And as a further and special demurrer to said Complaint, defendant states: That it appears from said Complaint that the alleged cause of action therein is based upon the fraud of defendants, Tevis and McKittrick and that said alleged cause of action is barred by the provisions of Sub-Division 5 of Paragraph 2949 (Section 15) of the Revised Statutes of Arizona, as amended by Act No. 41 16, approved March 12, 1903, Session Laws of 1903, Page 25.

II.

Further answering said Complaint and by way of answer thereto, this defendant alleges: That it appears from said Complaint that the alleged cause of action therein is based upon the fraud of defendants, Tevis and McKittrick, and said alleged cause of action is barred by the provisions of Sub-Division 5 of Paragraph 2949 (Section 15) of the Revised Statutes of Arizona, as amended by Act No. 16 approved March 12, 1903, Session Laws of 1903. Page 25.

III.

This defendant now moves the Court to strike from said Complaint the following contained in Paragraph V thereof, to-wit:

"And the said defendants then and there promised that if they were so placed in control of said corporation and the said capital stock of said corporation was changed to 1,000,000 shares of the par value of \$1.00 each, and 240,000 shares thereof placed in the treasury of said Company to be sold, that they would proceed at once to sell enough of said stock to pay off said judgment;"

on the ground that the same is irrelevant in that the subject matter thereof is and was merged in a written agreement thereafter executed between the parties which agreement is in said Complaint fully set out; and on the further ground that the same is, for the same reason, redundant.

Also the whole of Paragraph X (ten) of said Complaint on the ground that the same is irrelevant in that it does not show a tender as by law required and can in no way assist the decision of the Court

42 upon the cause of action sought to be alleged; and that it is frivolous; and that said tender is not applicable and not pertinent to said cause of action, and does not serve to support plaintiffs' said cause of action.

IV.

This defendant now moves the Court for an order directing the said plaintiffs to make said Complaint more definite and certain in the following particulars: It cannot be determined from said Complaint whether the alleged representations and promises made by defendants Tevis and McKittrick which are alleged to have induced said plaintiffs to enter into the agreement set out in said Complaint, were true or false; or whether or not said defendants knew said representations were false; or whether said representations were by said defendants made with the intention that said plaintiffs should act upon the same or whether said plaintiffs did act in reliance upon said representations; or whether or not said plaintiffs suffered injury thereby; or whether said defendants made the representations and promises in said Complaint alleged with intent, at the time of such promises, not to perform them; and the said Complaint is in the particulars in this Paragraph mentioned indefinite and uncertain.

V.

This defendant further answering said Complaint and Paragraph VI thereof, alleges:

43 That it has no information or belief upon the subject therein stated sufficient to enable it to answer the same, and placing its denial upon that ground denies: That the capital stock of said Corporation was accordingly or at all changed from 100,000 shares of the par value of \$10.00 each to 1,000,000 shares of the par value of \$1.00 each, or that there was any change under said agreement or otherwise made in the capital stock of said corporation, or that 240,000 shares or any number of shares thereof were placed in the control and keeping of said Tevis and said McKittrick, or either of them or that said shares were placed in the treasury of said Company for sale or for any other purpose or that any stock of said Corporation was divided in any manner, or that said plaintiffs resigned as Directors of said corporation in 1903, or at any other time, or that said Tevis and said McKittrick were placed in control of said corporation by any method, or were ever in control thereof; or that said Tevis and said McKittrick controlled the Directors thereof; or that said Directors were in the interest of said Tevis and said McKittrick; or that said Tevis and said McKittrick have owned or have controlled a majority of the capital stock of said corporation; or that they by reason thereof have selected the Directors of said Corporation, or that said Directors of said Corporation have acted or would act with entire subservience to said Tevis and said McKittrick; or that said plaintiffs have had no voice in the affairs of said Corporation.

Deny that the Directors of said Corporation elected or appointed at any time, or that the Directors serving said corporation at any

time since the organization thereof, or now, have been by said Tevis and said McKittrick, or by any person controlled in the interest of this defendant, and this defendant states the fact to be that it has not now, nor has it at any time, had any interest in said corporation, nor has this defendant at any time, had knowledge or notice of any of the transactions of said Turquoise Copper Mining and Smelting Company, in relation to the matter in said Complaint alleged.

VI.

Answering Paragraph VII of said Complaint this defendant alleges that it has no information or belief upon the subject therein stated sufficient to enable it to answer the same, and placing its denial upon that ground denies: That the said Tevis and said McKittrick sold the said 240,000 shares of the capital stock of said Corporation or any other number of shares of stock to intimate friends or others for a sum less than \$2,500 or for any other sum or that they thereby placed it out of their power to comply with said contract or to sell said stock, and out of the proceeds pay the judgment in the said complaint mentioned, or that said or any sale was made without the consent of said plaintiffs.

Deny that the moneys so realized from the sale of said stock were not used toward the payment of said judgment but that said moneys were used in and about the operating expenses of said Company. Admit that the said judgment in favor of said T. B. McPherson in said Complaint mentioned was paid by money furnished by said Tevis for which said Tevis took the notes of said Turquoise Copper Mining and Smelting Company. This defendant denies that

45 said Tevis assigned said notes to this defendant on or about the 1st day of April, 1905, but states the fact to be that the said Tevis did on April 5, 1904, assign the said notes of said Turquoise Copper Mining and Smelting Company by him held to this defendant, and this defendant took said notes without notice of any of the matters or things or transactions alleged in said Complaint, and this defendant paid to said Tevis the full value thereof, to-wit, a sum in excess of the \$40,000.00, and on January 12, 1905, loaned said Turquoise Copper Mining and Smelting Company the further sum of \$3,020.00, taking its note therefor, which said note was authorized to be issued by its Board of Directors, and delivered to the defendant, and paid to said Turquoise Copper Mining and Smelting Company the sum of \$3,020.00. Deny that the stock of the said Western Company is owned entirely by said Tevis or that the said corporation or the stock thereof is now or at all times has been entirely owned or controlled by him.

VII.

Further answering said Complaint admits Paragraph VIII thereof.

VIII.

Answering Paragraph IX of said Complaint this defendant alleges that it has no information or belief upon the subject matter therein

contained sufficient to enable it to answer said allegation and placing its denial upon that ground denies: That said Directors of said Turquoise Copper Mining and Smelting Company are or were
46 controlled by said Tevis and McKittrick, or that said Board allowed said McKittrick a salary of \$350.00 per month as Secretary of said Corporation; or that said Directors allowed said McKittrick to recover judgment therefor in the Court at the time and in the sum in said Paragraph mentioned, or at all, but allege that said judgment was by said McKittrick procured in a due and legal manner and with all the forms of law.

IX.

Answering Paragraph X of said Complaint this defendant denies that said plaintiff did prior to the commencement of this action or at any other time, demand or have at any other time demanded, of this defendant, that they be placed in the same position that they were in at the time and prior to the making of the contract between said plaintiffs and said Tevis and McKittrick.

Deny- that said Plaintiffs before the commencement of this action, or at any other time have offered to pay four-sevenths or any portion of the sum of money expended by this defendant in the purchase of the mining property in said Complaint mentioned, under the sale therein set out, or that they have ever tendered to this defendant any sum of money in payment of such sums so expended, or any part thereof, but admit that this defendant has refused and still refuses to transfer said property or any portion thereof to the said plaintiffs. That this defendant is now and ever since the purchase of said property as in said complaint described, has been, the owner
47 in fee simple thereof and holds said property for itself alone; and deny- that it holds the property in trust for said plaintiffs in any proportion or for any other person, or at all.

Wherefore this defendant prays that the plaintiffs recover nothing by this action. That the complaint herein be dismissed and that this defendant go hence without day, and recover of plaintiffs its costs in this behalf incurred and expended. And for such other and further relief as to the Court may seem meet and proper and equitable in the premises.

CUNNINGHAM, ELLERBE & RIGGS,
H. L. PACKARD,

Attorneys for Western Company.

STATE OF CALIFORNIA,
County of Kern, ss:

E. D. Buss, being first duly sworn, deposes and says: That he is the President of the Western Company, one of the defendants in the above-entitled action. That he has read the foregoing Answer and knows the contents thereof, and that the same is true in substance and fact except as to the matters therein stated on informa-

tion and belief and as to those matters he believes it to be true in substance and fact.

E. D. BUSS.

Subscribed and sworn to before me this 26th day of March, A. D. 1908.

[SEAL.] F. W. ROBINSON,
*Notary Public in and for the County
of Kern, State of California.*

My Commission expires June 19, 1909.

48 (Title Court and Cause.)

Affidavit for Attachment.

TERRITORY OF ARIZONA,
Cochise County, ss:

— — — being duly sworn, deposes *Deposes*. That he is One of the Attorneys of the Plaintiffs in the above entitled action.

That the plaintiffs and each of them are absent from this Territory, and That affiant is acquainted with the facts hereinafter set out, and therefore makes this affidavit in their behalf.

That the Defendants and each of them are non-residents of the Territory of Arizona, and they are and each of them is a resident of the state of California.

That an action for Damages is pending in this Court, between the parties to this suit in which the Plaintiffs claim damages in the sum of One Hundred Thousand Dollars.

That the Defendants are about to remove their property beyond the jurisdiction of this Court to avoid payment of the judgment that plaintiffs may obtain, and that the attachment is not sought for wrongful or malicious purpose, and that the action is not prosecuted to hinder or delay any creditor of the defendants.

JAMES REILLY.

Subscribed and sworn to before me this 23d day of April A. D. 1908.

[SEAL.] GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy*.

49 TERRITORY OF ARIZONA,
Cochise County:

OFFICE OF THE SHERIFF.

I hereby certify, That by virtue of the Writ of Attachment hereto annexed, I did, on the 23 day of April, 1908, and in the presence of A. A. Hopkins and Owen E. Murphy levy on and attach all the right, title and interest of each and every of the defendants named in said Writ, in and to all the Horned Cattle, consisting of cows, bulls, steers, heifers and calves, and in and to all the horses and

mules, running on the range in the Sulphur Springs valley, in the Northern part of Cochise County, and branded and ear marked, in the various Brands and marks, as shown in Printed Copy hereto attached.

And I further certify that I estimate the number of said horn cattle to be about six thousand seven hundred head, and the number of said Horses to be about one hundred head, and the number of mules to be about four. And I cannot more closely estimate the number of the said horn cattle or horses or mules, nor can I tell how many of each are branded and marked in each of said brands. And I further Certify that I have delivered a copy of said Writ, together with a Notice in writing of the levy and attachment by me made as aforesaid to the Agent J. B. Parks who has charge of the said cattle, horses and mules, on the 24th day of April,

1908.

JOHN F. WHITE,
Sheriff of Cochise Co.

Tombstone, Ariz., April 25, 1908.

(Title Court and Cause.)

Writ of Attachment.

The Territory of Arizona to the Sheriff or any Constable of Cochise County, Greeting:

We command you that you attach forthwith, so much of the property of the Western Company, a corporation, W. S. Tevis and W. H. McKittrick if to be found in your county, as shall be of value sufficient to make the sum of \$100,000.00 and the probable costs of suit to satisfy the demand of the Plaintiff above named, and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before the court, and that you may make return of this writ showing how you have executed the same.

Witness: The Hon. Fletcher M. Doan, Judge of said District Court, Witness and attest my hand and seal of the said court at the Cochise County Court House, in the said county, this 23rd day of April, 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy*.

51

(Title Court and Cause.)

Answer.

Now come W. S. Tevis and W. H. McKittrick, defendants in the above entitled action and adopt their answer to the original complaint of plaintiffs heretofore filed and make the same their answer

to plaintiffs' amended complaint the same as though set out in *hee verba*, and in addition, they deny all and singular the matters and things set out in plaintiffs' amended complaint, except those matters and things which are specifically admitted in their original answer.

Wherefore, these defendants pray that plaintiffs recover nothing, and these defendants go hence without day and recover their costs.

CHARLES BOWMAN,
BEN GOODRICH,
*Attorneys for Defendants W. S. Tevis and
W. H. McKittrick.*

(Title Court and Cause.)

Demurrer and Reply to Answer and Motion to Strike.

I.

Now come plaintiffs and demur to all that part of defendants' answer, commencing on line 17, Page 1, with the words "For further special exception" and ending on line 3, of Page 2, with the words "Session Laws of 1903", on the ground that the same does not state facts sufficient to constitute a defense or counter claim to plaintiffs' amended complaint.

52

II.

And Plaintiffs in reply to all the said matter pretending to plead the Statutes of Limitations of One Year, aver, that during all the time from the 29th day of November 1902, to the present time the defendants and each of them, were absent from the Territory of Arizona, and resided without said Territory, and in the State of California.

III.

And Plaintiffs now move the Court for an order striking out from Defendants' said answer, all that matter commencing on Line 17, of Page 1, with the words "For further special exception" and ending on Line 3, of Page 2, with the words "Session Laws of 1902", on the ground, that the same is frivolous, irrelevant and sham.

Second. Also to strike out all that matter commencing on Line 21, of Page 4, of said Answer with the words "Defendants further allege" and ending on Line 7, of Page 5, with the words "As these defendants had", on the ground that the same is frivolous, irrelevant and sham.

Third. Also to strike out all that matter commencing on Line 8, of Page 6, of said answer, with the words "These defendants allege" and ending with the words "Redemption had expired" on last line

of Page 6, and immediately before the prayer, on the ground that the same is frivolous, irrelevant and sham.

JAMES REILLY,
E. S. IVES,
J. KINGSBURY,
Att'ys for Plaintiffs.

53

(Title Court and Cause.)

Amended Answer.

Now comes the defendants W. S. Tevis and W. H. McKittrick, and answering for themselves alone and not for their co-defendant, The Western Company, the plaintiffs' amended complaint, for demurrer say:

That plaintiffs' amended complaint does not state facts sufficient to constitute a cause of action against these defendants.

For special demurrer they say, that that portion of Paragraph 5 of plaintiffs' complaint, to the effect that these defendants promised that if they were placed in control of said corporation, and the capital stock of said corporation was changed to one million shares of the par value of one dollar each, and 240,000 shares thereof placed in the treasury of said Company to be sold, that they would proceed to sell enough of said stock to pay off said judgment, is insufficient to constitute a cause of action against these defendants, because these defendants say that said promise did not relate to any existing fact but was a promise simply that they would do something in the future, and does not constitute an estoppel.

For further special exception to plaintiffs' complaint, these defendants allege that it appears upon the face of the complaint itself that the action for which plaintiffs pray relief is based upon the ground of fraud, and that said action was not commenced or prosecuted within one year after the cause of action accrued, and is barred by the statute of one year's limitation, Subdivision 5 Paragraph

2949 of the Revised Statutes of 1901 of Arizona, as amended
54 by Act No. 16, approved March 12, 1903, Session Laws of 1903.

Wherefore, they pray that that portion of Paragraph 5 be stricken out as irrelevant and immaterial.

And for further special demurrer these defendants say, that there is no allegation in the complaint that plaintiffs relied upon said promise, or were induced thereby, to enter into the agreement mentioned in plaintiffs' complaint, and that they had not right to rely upon promises of that character.

Further answering in this behalf these defendants say, that said plaintiffs ought not to have and maintain their aforesaid action thereof against them, because they say that their pretended cause of action is based upon the ground of fraud and was not commenced nor prosecuted within one year after the pretended cause of action accrued and is barred by Subdivision 5 Paragraph 2949 of the Re-

vised Statutes of Arizona for 1901 as amended by Act No. 16, Approved March 12th, 1903, Session Laws 1903.

Further answering these defendants admit the allegations contained in Paragraphs 1, 2, 3, 4 and 5, and that portion of Paragraph 6 of plaintiffs' amended complaint alleging that the Turquoise Copper Mining & Smelting Company and plaintiffs had no funds wherewith to redeem against said execution sale, nor other means of raising the money therefor, but deny that defendant McKittrick was the owner of large or abundant money or property wherewith to make said redemption or develop said property.

They deny that defendants Tevis and McKittrick represented to plaintiffs that they desired to be placed in absolute control of said Turquoise Copper Mining & Smelting Company or its property without interference of plaintiffs in the business of said corporation, or, if so placed in control of said corporation and its management, they, through their financial or other ability and that of their friends and associates, would and could redeem the property of said corporation from the sheriff's sale made on July 31st, 1902, or sell sufficient of the stock of said corporation to pay said redemption money, and to raise sufficient money to prospect, work or develop said property in the interest of all the parties concerned. They allege the true facts in relation to said transaction are as follows:

That on or about November 29th, 1902, at a meeting of the stockholders of the Turquoise Copper Mining & Smelting Company, at Willcox, Arizona, plaintiff Jepp Ryan, his co-plaintiffs being then and there present and hearing the statement, stated to defendant McKittrick the fact that McPherson had a judgment against the Company for about the amount named in plaintiffs' complaint, and that he was fearful that McPherson would enforce the judgment lien on said property by a sale thereof and secure the title to the property mentioned in plaintiffs' complaint in himself, and requested defendant McKittrick to raise the money to redeem against said sale. That said defendant McKittrick then and there stated to him, said Jepp Ryan, that he had not the means himself to do so, and would not do so if he had the means, for the reason that the said plaintiffs Ryan owned four-sevenths of the stock while he and his associates

owned only three-sevenths of the stock, and that if he and his friends raised the money to redeem against said sale that it would be for the greater benefit of the Ryans than for defendant McKittrick and his associates, and that he would have no security for the four-sevenths of the money which could probably be raised and which would represent the interest owned by the Ryans in the case that he defendant and his associates should redeem. Thereupon the said Jepp Ryan told him that he would make any kind of a contract that he, defendant McKittrick desired, and asked defendant McKittrick to help him devise some scheme by which the money could be raised to pay off said judgment lien and develop the property and thereby save the Company's property from sale, and after further conversation on the subject, the scheme was devised which is mentioned in the agreement set out in plain-

tiffs' complaint, and that said agreement was made upon the solicitation of plaintiffs themselves and not at the solicitation or on the suggestion of these defendants or either one of them. That as a matter of fact defendant Tevis was not present and knew nothing about it until afterwards.

These defendants deny that plaintiffs ever performed the terms of said contract agreed by them to be performed, except that they did resign as directors and ceased to take any part in the management of the affairs of said corporation after their said resignation.

These defendants deny that they or either of them caused the Articles of Incorporation of the Turquoise Copper Mining & Smelting Company to be amended so as to change the capital stock
57 of said corporation from 100,000 shares of the par value of \$10.00 per share to 1,000,000 shares at the par value of \$1.00 per share, or caused said stock to be issued accordingly; on the contrary these defendants allege that said amendment was made at the meeting of the stockholders of said Company of November 29th, 1902, held at Willcox, at which plaintiffs were present and voted and participated in the vote carrying said amendment.

These defendants deny that they or either of them at any time promised or agreed that if they were placed in control of said corporation, and the capital stock of said corporation was changed to 1,000,000 shares at the par value of \$1.00 each and 240,000 shares thereof were placed in the treasury of said Company to be sold, that they would proceed to sell enough to pay off said judgment lien; and they deny further that by means of said representations, pretenses or promises, or by reason of any other means, these defendants then or there induced plaintiffs to enter into said agreement set out in plaintiffs' amended complaint. On the contrary these defendants allege that if anything was said in regard to the sale of stock, that it was a mere expression of opinion of defendant McKittrick that they would probably be able to sell a sufficient amount of said stock for that purpose and that they would use their best endeavors to do so.

These defendants admit that they sold 32,000 of the 240,000 shares placed in the treasury of the Company for 25¢ per share, and received therefor the sum of \$800.00, but deny that
58 thereafter, or at any time, they ever sold or gave to themselves or friends the remaining 208,000 shares of said treasury stock at $\frac{3}{4}$ of one cent per share. They allege in this regard that said stock was sold in strict accordance with said agreement mentioned in plaintiffs' complaint and at the price fixed by the Board of Directors of said corporation, and that plaintiffs were notified of the same and acquiesced therein after full knowledge of the facts.

That of the 240,000 shares of stock all which except 208,000 shares were sold for more than 20¢ per share, and as to the 208,000 shares of stock plaintiffs were duly informed of the necessity of a sale of the same, which was offered to them prior to it being offered for sale to anybody else, and plaintiffs were requested to make a bid on the same in order to pay off the judgment lien and the debts of

the Company, and plaintiffs absolutely ignored the communication informing them of the fact.

Defendants further allege that all of the stockholders except plaintiffs themselves agreed to assess themselves five cents on the dollar of every share of stock they held in order to redeem the property against the McPherson judgment lien and to pay off other indebtedness of the Company, and solicited that plaintiffs should pay a like assessment on the stock held by them, and they refused so to do. That the payment of said assessment of five cents per share would have raised a sufficient amount of money to have saved the property from the sale under the McPherson judgment lien and pay off the other indebtedness of the Company.

59 These defendants allege that plaintiffs were notified of every meeting of the stockholders, and were furnished with a copy of the minutes of every meeting of the stockholders of the Company, and of every meeting of the directors of the Company, and had as much knowledge of the condition of affairs and of the financial condition of the Company and of the sales of stock, and of the disposition of the funds, as these defendants had and never protested or objected to any of said proceedings but acquiesced in the same; and defendants also deny that the sale of said stock was made without the consent of plaintiffs.

These defendants deny that they or either of them caused the Western Company to bring or prosecute a suit in the Superior Court of Kern County, California, against the Turquoise Copper Mining & Smelting Company on all or any of the notes mentioned and described in Paragraph 8 of plaintiffs' amended complaint, or caused the said Western Company at any time to bring or prosecute suit in this court, Cause No. 2968, against the Turquoise Copper Mining & Smelting Company on the judgment of the Superior Court of Kern County, California, mentioned in said Paragraph 8, or caused or procured an execution to be issued on said last mentioned judgment out of this court to the sheriff of Cochise County, or caused or procured the sale under said execution — be made of the property mentioned and described in Paragraph 3 of plaintiffs' amended complaint.

These defendants allege that the money to pay off said McPherson lien was loaned to said Company by defendant Tevis, and that the money so loaned was used to satisfy said judgment lien, and
60 said Company executed to said defendant Tevis notes for the amount so loaned. That it was impossible to secure the money from any other source than said Tevis after repeated applications to other parties, and that said Tevis loaned said money to pay said McPherson judgment lien in order that he might save the property from being sold and all of the property of the Company being lost, which fact was well known to plaintiffs.

These defendants deny that plaintiffs had no notice or knowledge of said judgments or sale or any of them until after the 12th day of August, 1905, as alleged in Paragraph 9 of their amended complaint; on the contrary defendants allege that they had due and timely notice long prior to the date of said sales, and had ample op-

portunity to redeem against the said sales if they had been so disposed.

These defendants deny that said mines mentioned in plaintiffs' complaint were on the 29th of November 1902 or 1904, or were at any time since or now are worth the sum of \$230,000.00 or any other sum in excess of \$25,000.00; that *its* value is entirely speculative and conjectural, that no ore of any quantity sufficient to work profitably has ever been discovered on any of the claims since *it* came into the possession and ownership of the Turquoise Copper Mining & Smelting Company; and these defendants deny that by reason of their conduct or management of said property or business of said Company, or by any other act of theirs whatever, or any act or omission of theirs, permitted, procured or caused to be done by

61 them, said mines were lost to the Turquoise Copper Mining & Smelting Company or vested in the Western Company.

and deny that the capital stock of the Turquoise Copper Mining & Smelting Company has by any act of theirs become worthless, or that plaintiffs have been injured or damaged in any sum of money, or at all. Deny that they or either of them caused the title of said corporation to the mines and mining claims described in plaintiffs' amended complaint to be vested in the Turquoise Copper Mining & Smelting Company or vested in the Western Company with the intent or for the purpose of cheating, wronging or defrauding plaintiffs out of their interest in the same, or for any other purpose, or with any intent. Deny that there is or ever has been any secret or other contract, agreement or understanding with them and the Western Company by which these defendants own or control the title to said mining claims, or that they can cause the Western Company to convey to defendants any interest in said property.

On information and belief, they deny that plaintiffs have been ready, able or willing since February 1905, or are now ready, able or willing, or have any intent or desire to pay to these defendants or to anybody else \$16,200.00, or any sum of money whatever for the benefit of these defendants, and they allege in this regard on information and belief, that said alleged offer, which is no offer at all, is not made in good faith, because defendants say that it is predicated upon a reconveyance of the property of the Company and four-sevenths of the capital stock of the corporation to plaintiffs, & because they say that plaintiffs have had ample opportunity

62 to pay off said sum and to pay off all the judgments and redeem said property against all claims and liens if they had been so disposed, and which it was their duty to do, long before the time for redemption had expired, and long before the filing of this action.

Defendants allege that neither of the plaintiffs ever relied upon any statement or representation made by these defendants or either of them, but acted upon their own independent judgment and had complete and perfect knowledge of all the facts and circumstances surrounding the whole transaction between them and defendants from the time of the execution of the contract set out in plaintiffs' complaint up to the final passage of the title of the property from

the Turquoise, Copper Mining & Smelting Company to the present owners.

Wherefore, these defendants pray that plaintiffs take nothing by their suit; that these defendants be dismissed hence without day and recover their costs of plaintiff-, and for such other relief legal, general and equitable as may be meet and proper in the premises.

CHARLES BOWMAN,

BEN GOODRICH,

Attorneys for Defendants.

W. S. Tevis and W. H. McKittrick.

TERRITORY OF ARIZONA,

County of Cochise, ss:

W. H. McKittrick being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true in substance and in fact except those
63 matters stated on information and belief, and as to such matters he believes it to be true.

W. H. MCKITTRICK.

Subscribed and sworn to before me this 2nd day of June, 1908.

[SEAL.]

E. G. SHEPARD,

*Notary Public in and for
Cochise County, Arizona.*

My commission expires February 20th, 1911.

(Title Court and Cause.)

Demurrer and Reply to Amended Answer and Motion to Strike.

I.

Now come plaintiffs and demur to all that part of defendants' amended answer, commencing on Line 17, of Page 1, with the words "For further special exception" and ending on Line 3, of Page 2, with the words "Session Laws of 1903," on the ground that the same does not state facts sufficient to constitute a defense or counter claim to plaintiffs' amended complaint.

II.

And plaintiffs in reply to all the said matter pretending to plead the Statutes of Limitations of One Year, aver that during all the time from the 29th day of November 1902, to the present time the Defendants and each of them, were absent from the Territory of Arizona, and resided without said Territory, and in the State of California.

III.

And plaintiffs now move the Court for an order striking out from Defendants' said amended answer, all that matter commencing on Line 17, of Page 1, with the words "For further
64 special exception" and ending on Line 3, of Page 2, with the

words "Session Laws of 1903" on the ground, that the same is frivolous, irrelevant and sham.

Second. Also to strike out all that matter commencing on Line 19, of Page 5, of said amended answer with the words "Defendants further allege" and ending on Line 3, of Page 5, with the words "Of said Proceedings," on the ground that the same is frivolous, irrelevant and sham.

Third. Also to strike out all that matter commencing at Line 29, of Page 7, with the words "On information and belief" and ending with the words "filing of this action" at Line 10, of Page 8, of said amended answer, on the ground that the same is frivolous, irrelevant and sham.

JAMES REILLY,
E. S. IVES,
G. NEAL,
J. KINGSBURY.

(Title Court and Cause.)

Now comes the defendant, W. H. McKittrick, and by way of replication to plaintiffs' "demurrer and reply to defendants' answer and motion to strike," this defendant McKittrick,

Denies that he was without the limits of this Territory at the time of the accruing of plaintiffs' action, or at any time during which the same might have been maintained.

This defendant denies that he has been absent from the
65 Territory of Arizona from November 29th, 1902, up to the present time; on the contrary, he alleges that he has been within the limits of the Territory, and in Cochise County, on an average of once a month for the last five years openly and publicly attending to his business.

Wherefore, this defendant prays that plaintiffs' motion be denied.

CHARLES BOWMAN,
BEN GOODRICH,
Attorneys for Defendant, W. H. McKittrick.

(Title Court and Cause.)

Answer to Second Amended Complaint.

Now come the defendants in the above entitled action, and except and object to plaintiffs' second amended complaint filed herein, and say the same is insufficient in law for this, to wit:

That it appears on the face of the complaint itself that this court has no jurisdiction over the persons of these defendants nor over the subject matter of the action.

That said complaint on its face fails to show that either of the plaintiffs or either of the defendants reside in Cochise County or in the Territory of Arizona.

That said complaint on its face shows that all of the plaintiffs and all of the defendants are non residents of the Territory of Arizona.

That plaintiffs' second amended complaint does not lay any venue in this court authorizing the court to assume and exercise jurisdiction over the person of defendants or over the subject matter involved in this action.

That plaintiffs' second amended complaint does not state facts sufficient to constitute a cause of action against these defendants.

1. For special demurrer these defendants say, that that portion of Paragraph VI of plaintiffs' first cause of action in said second amended complaint, to the effect that these defendants represented that they were the owners of large or abundant means or property wherewith to redeem said property from sale, and that if they were placed in absolute control of the Turquoise Copper Mining & Smelting Company and all its property without interference of plaintiffs in the business of said corporation, that they, through their financial ability, and that of their friends and associates, could and would redeem said property from said sale and sell sufficient stock of said Company to reimburse the parties thereto, the moneys expended by them respectively did not relate to any existing fact but was a statement simply that they would do something in the future, and does not constitute an estoppel.

2. For further special exception to the first count of plaintiffs' second amended complaint, these defendants allege that it appears upon the face of the complaint itself that the action for which plaintiffs pray relief, is based upon the ground of fraud, and that said action was not commenced or prosecuted within one year after the cause of action accrued, and is barred by the Statute of one year's limitations, Subdivision 5, Paragraph 2945 of the Revised Statutes of Arizona, 1901, as amended by Act No. 16, approved March 12th, 1903, Session Laws of 1903.

Wherefore they pray that those portions of Paragraph 6 be stricken out as irrelevant and immaterial.

3. Further answering in this behalf these defendants says, that said plaintiffs ought not to have and maintain their said action thereof against them, because they say that their pretended cause of action is based upon the ground of fraud, and was not commenced nor prosecuted within one year after the pretended cause of action accrued and is barred by Subdivision 5 Paragraph 2945 of the Revised Statutes of Arizona for 1901 as amended by Act No. 16, approved March 12, 1903, Session Laws of 1903.

4. These defendants say that they have no knowledge or information on the subject sufficient to enable them to answer the allegations of plaintiffs in Paragraph 5 of the first count of said second amended complaint, to the effect that at the time of the sale of said property under the execution issued in the case of S. H. Bryan against the Turquoise Copper Mining & Smelting Company, it was understood and agreed between plaintiffs and McPherson, that if said McPherson would purchase said property at said execution sale, or would hold the same in trust for the benefit of himself to the extent of the amount of said judgment, and for the benefits of the plaintiffs to the extent of the amount of the moneys which had been advanced and expended by them in and about the said

properties, which said moneys amounted to the sum of \$87,000.00, and placing their denial upon such lack of information, they deny said allegations in said Paragraph 5 contained.

68 5. These defendants deny that they ever were informed or knew anything of any understanding or agreement between the said McPherson and Plaintiffs, and deny that they or either of them, on or about November 29th, 1902, or at any time, represented to plaintiffs or either of them that they, the defendants, were the owners of large or abundant means or property wherewith to redeem said property from said sale, and deny that they stated if they were placed in absolute or other control of said Turquoise Copper Mining & Smelting Company and all its property without interference of plaintiffs in the business of said corporation, that they, through their financial ability, or for any other reason, or through their friends or associates, could or would redeem said property from said sale, or sell sufficient stock of said company to develop the said property or reimburse the moneys expended by them on said property, and deny that they or either of them thereafter, or at any time, induced said plaintiffs by any representations whatever, or requested plaintiffs to the end that defendants might not by reason of said execution sale lose their interest in said property, induced plaintiffs to enter into the contract mentioned and described in said second amended complaint. And they deny that defendants ever agreed or promised or undertook to sell the treasury stock mentioned in Paragraph 6 of plaintiffs' first count for a sum not less than was necessary or sufficient to provide funds wherewith to make said redemption and \$20,000.00 or any other sum additional for the purpose of developing said properties, or any other sum other than that fixed by the Directors of said Company.

69 And these defendants further deny that in consideration of plaintiffs executing said contract, or any considerations whatever, ever agreed that in the event they should fail within two years after the execution of said contract to raise by sale of the treasury stock sufficient funds wherewith to redeem said judgment and to furnish \$20,000.00 for the purposes of development, and deny that in the event they should fail, out of the proceeds of sale of said 20,000 shares of the stock held in trust, to reimburse the plaintiffs in the sum of \$87,000.00, or any other sum alleged to have been expended by plaintiffs on said property, that they, the defendants, or either of them, would procure plaintiffs to be reinvested with the same interest in said properties which they had prior to November 29th, 1902, or would re-establish the relation or status of plaintiffs to said property so that plaintiffs' relation in and to said property would be substantially in effect the same as it had been prior to November 29th, 1902, and as it would have been if said contract had never been made. They allege that the true facts in relation to said contract and the execution thereof to be as follows:

That on or about November 29th, 1902, at a meeting of the stockholders of the Turquoise Copper Mining & Smelting Company at Wilcox, Arizona, plaintiff Jepp Ryan, his codefendants being then and there present and hearing the statement, stated to de-

fendant McKittrick that he, Jepp Ryan, had procured McPherson to bid in said property at the foreclosure sale made on the judgment of S. H. Bryan and wife against the Company, and that he,

70 said McPherson, would hold the title to the property mentioned in plaintiffs' complaint in himself, and requested defendant McKittrick to raise the money to redeem from against said sale. That said defendant McKittrick then and there stated to him, said Jepp Ryan, that he had not the means himself to do so, and would not do so if he had the means, for the reason that the said plaintiffs Ryan owned four-sevenths of the stock while he and his associates owned only three-sevenths of the stock, and that if he and his friends raised the money to redeem against said sale that it would be for the greater benefit of the Ryans than for defendant McKittrick and his associates, and that he would have no security for the four-sevenths of the money which could probably be raised and which would represent the interest owned by the Ryans in the case, he defendant and his associates should redeem.

Thereupon the said Jepp Ryan stated to defendant McKittrick that he would make any kind of a contract that he defendant McKittrick desired, because McPherson would keep the property and all the stockholders interested would lose it, and requested defendant McKittrick to help him to devise some scheme by which the money could be raised to redeem said property and develop it. And after further conversation on the subject, the scheme was devised which is mentioned in the agreement set out in plaintiffs' complaint, and that said agreement was made upon the solicitation of plaintiffs themselves and not at the suggestion or solicitation of the defendants or either of them. That as a matter of fact the de-

71 fendant Tevis was not present and knew nothing about it until long afterwards.

These defendants deny that plaintiffs ever performed the contract agreed by them to be performed, except that they did resign as Directors and ceased to take any part in the management of the affairs of said corporation after their said resignation.

These defendants deny that they or either of them caused the Articles of Incorporation of the Turquoise Copper Mining & Smelting Company to be amended so as to change the capital stock of said corporation from 100,000 shares of the par value of \$10.00 per share to 1,000,000 shares at the par value of \$1.00 per share, or caused said stock to be issued accordingly; on the contrary these defendants allege that said amendment was made at the meeting of the stockholders of said Company on November 29th, 1902, held at Wilcox, at which plaintiffs were present and voted and participated in the vote carrying said amendment.

6. These defendants admit that they did not within two years or at any time, out of the moneys received from the sales of treasury stock liquidate the S. H. Bryan judgment or redeem said property from said execution sale, and did not apply any of the moneys received from the sale of stock to the liquidation of said judgment or to the redemption of said property from said execution sale, and did not, as trustee or otherwise, reimburse plaintiffs or any or

72 either of them in the sum of \$87,000.00 alleged to have been expended by plaintiffs upon said properties.

In this regard these defendants allege, that it was impossible to sell and that they did not sell a sufficient amount of said stock or realize a sufficient sum of money to satisfy said judgment or redeem said property from said execution sale, they allege that they never agreed to do so, and were under no obligations whatever to do so, that their only obligation and undertaking was to sell so much of said stock as was possible to sell upon the market, which they allege they did; and they allege that they never did agree or promise to reimburse plaintiffs or either of them in any sum whatever out of the sale of the stock; that they were compelled to and did expend the money, about \$9,500.00, received from the sale of the 280,000 shares of treasury stock in the payment of taxes on said property, in procuring patents for the various claims belonging to the Company, in paying attorneys' fees to procure said patents, and other services in paying for supplies absolutely necessary for the protection of the mines, in paying watchman to take care of the mines, and in pumping the water out of the mines in order that the same might be saved from absolute destruction, and any other expenses which were essential and necessary to keep the property in proper condition as a mining proposition.

7. Defendants deny that they ever agreed to turn over to plaintiffs or return to plaintiffs at the expiration of two years the interest of plaintiffs in said property and in said stock as it existed prior to November 29th, 1902.

8. They deny that they so managed the affairs and property of the said corporation as to divest it of any of its property or
73 assets; and deny that they ever procured any suits to be instituted by The Western Company against said property, or any judgment to be rendered, or execution sales thereunder to be made to procure the ownership thereof, or the title thereof to be vested in the said The Western Company, or for any other purpose; and deny that the said The Western Company at any time was or now is owned or controlled by the defendants or either of them; and deny that by reason of said management of the affairs of the Turquoise Copper Mining & Smelting Company by defendants the stock became worthless, or that plaintiffs have been in any way injured or damaged by any act of theirs.

9. These defendants allege that after the sale of said property mentioned and described in plaintiffs' complaint under the judgment and foreclosure of S. H. Bryan and wife against the Turquoise Copper Mining & Smelting Company and the purchase of said property under said sale by McPherson, that in order to redeem the said property from said sale it became necessary for the Company to procure money from some source; that it was impossible to sell enough stock to secure a sufficient sum of money to make said redemption, and it was impossible to secure the money from any other source than from W. S. Tevis, and that said Tevis in good faith and for the purpose of saving the property of the Company, loaned

said money to said Company, and said Company to secure him therefor executed and delivered to said Tevis its promisory notes in the sum of \$30,000.00, which facts were well known to plaintiffs and ratified and approved by them in writing.

74 That thereafter said Tevis transferred and assigned said notes and other notes executed by said Turquoise Copper Mining & Smelting Company for money borrowed of said Tevis, under the authority of said Company, to The Western Company, and thereafter the said The Western Company reduced said notes to judgment in Kern County, California, and subsequently sued on said judgment in the District Court of Cochise County, Arizona, and said property mentioned in plaintiffs' complaint was sold in satisfaction of said judgment and no redemption was ever made against the same.

That neither of these defendants were responsible for or in any way liable for the sale of said property and the rendition of said judgment, and that plaintiffs and each of them were fully notified of all these occurrences as they took place. That plaintiffs and each of them had due and timely notice long prior to the date of said judgments and sales, and had ample time to redeem against said sales if they had been so disposed.

10. These defendants and each of them deny that in the month of May, 1905, or at any other time, that plaintiffs notified them or either of them that they intended to bring suit to protect their interest; and deny that defendants or either of them at that time or at any time requested plaintiffs not to bring suit, or assured plaintiffs or agreed with plaintiffs that if they would not bring suit, that they, defendants, would protect the interest of plaintiffs and see that plaintiffs were reinvested in their interest as they existed prior to November 29th, 1902; and deny that plaintiffs

75 tiffs relied upon such or any assurance or agreements of defendants; and deny that they did not bring suit to protect their interest on account of any act, agreement or promise of defendants; and deny that by any act of theirs the Turquoise Copper Mining & Smelting Company became divested of its ownership or title in or to its assets or property or said mining claims. They allege that no consideration whatever existed or exists for any such assurance or agreement if the same was ever made.

11. Defendants further deny that the interest of plaintiffs in said property and corporation was on November 29th, 1902, or at any time thereafter, or is now, worth the sum of \$200,000.00, or any sum whatever.

12. These defendants further allege that plaintiffs were notified of every meeting of the stockholders and furnished them with copies of the minutes of every meeting of the stockholders and of every meeting of the Directors, and had as much knowledge of the condition of affairs and of the financial condition of the Company and all sales of stock, and plaintiffs never protested or objected to any of the proceedings but acquiesced in the same; and defendants deny that the sale of said stock was made without the consent of plaintiff.

Further answering plaintiffs' second amended complaint, and particularly the second cause of action therein, these defendants say, that said second count does not state facts sufficient to constitute a cause of action.

1. Defendants further allege that plaintiffs have undertaken to set up their contract, which is their cause of action, in said count contained according to its legal effect, a copy of which contract is hereto attached marked Exhibit "A" and made a part of this answer. And that it appears on the face of plaintiffs' complaint in said second cause of action set out that they have misstated the terms and provisions of said contract. Wherefore these defendants say that there is a variance between the cause of action as stated according to its legal effect with the terms of the contract upon which said allegations are based.

Wherefore defendants pray judgment of the sufficiency of said second count and pray that they may be dismissed with their costs.

And for further answer in this behalf these defendants hereby adopt and make the answer to the first cause of plaintiffs' amended complaint their answer to the second count of plaintiffs' amended complaint with the same force and effect as is fully set out.

And defendants for answer to the third cause of action set out in plaintiffs' second amended complaint hereby adopt and make their answer to plaintiffs' first and second causes of action their answer to plaintiffs' third cause of action as if the same were here fully set out.

1. Defendants deny that in June 1904, or at any other time, they wrongfully or fraudulently for the purposes of preventing the payment of the indebtedness of the Turquoise Copper Mining and Smelting Company held by Tevis against said corporation these defendants caused to be sold the remaining 208,000 shares of stock provided in said agreement to be sold for the purpose of paying said indebtedness. They allege that said stock was sold in strict accordance with said agreement mentioned in plaintiffs' complaint

77 and at the price fixed by the Board of Directors of said corporation and for the best price obtainable, and for all the stock was worth, and that plaintiffs were notified of the same and acquiesced in the same after full knowledge of the facts; and they deny that said sale was not made in good faith, and deny that said stock was worth or could have been sold for any sum in excess of three-fourths of one per cent per share. Deny that the purchaser thereof was an employee of the defendant Tevis, and deny that the purchase of said stock was for the benefit of the defendants or either of them, and deny that they refused prior to said alleged purchase by H. A. Jastro to sell said stock to plaintiffs for less than ten cents per share; deny that they in any way prevented the payment of said indebtedness for the purpose of permitting the said property to be sold or to be bid in by defendants or their representatives, or for their benefit; and deny that thereby or by any act of theirs, or either of them, they intended to convert or did convert for their own use or benefit any of the property of the corporation, or the interest of plaintiffs in the same.

They deny that in pursuance of any fraudulent or wrongful purpose they caused said corporation to issue to defendant Tevis its negotiable notes aggregating \$9,300.00, or caused the said notes with the \$30,000.00 note mentioned in plaintiff's complaint, to be assigned by said Tevis to said Western Company. They deny that said assignment was made for the purpose of having said indebted-

78 ness appear not to be held and owned by said Tevis and for the purpose of having the same to appear to be held by an innocent third party; and they deny that such indebtedness was actually in effect the property of said Tevis or continued to be the same after the assignment of said notes to said Western Company. And they deny that they or either of them have any interest whatever or have had since the sale made by decree of the court in the case of Western Company vs. Turquoise Copper Mining & Smelting Company, except a leasehold in said mining property held by defendant McKittrick, which expires on the 18th of July, 1908.

2. These defendants deny that by their fraudulent or any acts they have prevented the payment of said indebtedness, or caused said Western Company at any time to bring or prosecute any suit in court in the State of California against the Turquoise Copper Mining & Smelting Company on all or any of said notes.

3. These defendants deny that they or either of them procured or caused the said Western Company at any time to bring or prosecute suit in this court against the said Turquoise Copper Mining & Smelting Company on any judgment of any court of the State of California, and deny that they at any time caused or procured the said Western Company to issue execution on any judgment whatever out of any court to the sheriff of Cochise County, or any other one, by virtue of which the said sheriff at any time sold the mines and mining claims mentioned and described in plaintiffs' complaint for any sum of money.

4. They deny that in pursuance of any fraudulent or other
79 purpose, or for the purpose of increasing the indebtedness of the Turquoise Copper Mining & Smelting Company they caused defendant McKittrick to assert a demand against the said corporation for salary in the sum of \$9,775.00, and they deny that it was agreed or understood by and between plaintiffs and defendants that there should be no charge made for salaries by defendant McKittrick while defendants were in control of said corporation. They admit that said McKittrick did assert a demand against said corporation for salary in the sum mentioned in plaintiffs' third cause of complaint, but allege that it was for services rendered as General Manager of the Company under employment by the Board of Directors.

5. These defendants further deny that plaintiffs had no notice or knowledge of said judgments or sales until after the 12th day of August, 1905; on the contrary these defendants allege that they had notice shortly after the actions were brought and were kept advised of all the proceedings, and that copies of the proceedings of every meeting of the stockholders and of every meeting of the Directors were furnished to them besides information contained in personal

letters written by defendant McKittrick as Secretary of the Company, and they had as much knowledge of the condition of affairs and of the financial situation of the Company, of the sales of stock, of the disposition of the funds, and of the judgments, and of the sales of property under the judgments as these defendants had, and never protested or objected to any of the proceedings but acquiesced in the same; and defendants also deny that the sale of said stock was made without the knowledge or consent of plaintiffs. They deny
80 that while the suits of the Western Company were pending and judgments about to be obtained, that plaintiffs had no notice of the same.

6. These defendants deny that they ever assured plaintiffs that their interests would be protected; and deny that plaintiffs relied upon any assurance of defendants to that effect, or that they were induced to make no further investigation or inquiry as to the condition of the affairs of said Company; and deny that they ever converted the property of said corporation to their own use or that plaintiffs at any time relied upon any act or assurance of defendants in regard to the same; and deny that plaintiffs ever had any right to institute any cause of action against said Company or against either of these defendants to set aside, vacate, or to protect themselves against the judgments and mortgages mentioned and described in their complaint.

Wherefore, these defendants pray that plaintiffs recover nothing by their action, and that defendants be dismissed hence without day and recover from plaintiffs their costs in this behalf laid out and expended, and for such other and further relief as may be just and proper in the premises.

CHARLES BOWMAN,
BEN GOODRICH,

Attorneys for Defendants W. S. Tevis and W. H. McKittrick.

EXHIBIT "A".

This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp
81 Ryan, T. C. Ryan and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

Witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining & Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and whereas, the parties of the first part now own and control three sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

Now, therefore, in consideration of, that the capital stock of the

said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the Board of Directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47 Dollars. Second, to use the next \$20,000 received from the sale of said stock, to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000, when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.

82 It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto.

The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract, should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall

reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void, in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

Witness our hands the day and year first above mentioned.

WILLIAM S. TEVIS,

W. H. McKITTRICK,

Parties of the First Part.

JEPP RYAN,

THOMAS C. RYAN,

E. B. RYAN,

Parties of the Second Part.

TERRITORY OF ARIZONA,

County of Cochise, ss:

W. H. McKittrick being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing answer to the second amended complaint of plaintiffs, and knows the contents thereof; that the same is true in
83 substance and in fact except as to those matters stated on information and belief, and as to such matters he believes it to be true.

W. H. McKITTRICK.

Subscribed and sworn to before me this 15th day of July, 1908.

[SEAL.]

E. G. SHEPARD,

Notary Public in and for Cochise County, Arizona.

My commission expires February 20th, 1911.

(Title Court and Cause.)

Motion to Strike Out.

Now come the defendants in the above entitled action and move and pray the Court to strike out that portion of Paragraph 3 in the first count of plaintiffs' second amended complaint beginning with the words "that plaintiffs had expended" and ending with the Paragraph, because the same is irrelevant and redundant, and constitutes no part of a cause of action;

And for the same reasons defendants move to strike out all that portion of Paragraph 5 of the first count in said second amended complaint beginning on the 5th line of said Paragraph with the words "and at the time of the said sale it was understood" down to the end of said Paragraph;

And for the same reasons move the Court to strike out that portion of paragraph 6 commencing at the beginning of said paragraph and ending with the words "as aforesaid" on the 7th line from the top of page 5 of said Paragraph. And all that portion of said

84 Paragraph 6 commencing with the words "and for not less than a sum" on the 7th line from the top of page 6 down to and including the words "developing the said properties" on line 10 of said page 6.

And for the same reasons move the Court to strike out all that portion of Paragraph 6 of said second amended complaint beginning with the words "and defendants agreed" on line 16 page 6 and ending with the words "had never been made" on line 2 of page 7.

And for the same reasons move the Court to strike out all that portion of Paragraph 8 of said second amended complaint beginning with the words "upon information and belief" on line 12 of page 8 and ending with the words "sale" on line 16 of said page.

And for the same reasons move the Court to strike out all that portion of Paragraph 8 of said second amended complaint beginning with the words "and that said defendant McKittrick" on the 9th line of said Paragraph page 8 and ending at the bottom of the page.

And for the same reasons move the Court to strike out all that portion of Paragraph 8 on Page 8A commencing with the words "and of the interests of the plaintiffs" on the 10th line and ending with the words "and alleged" on the 15th line of said page.

And for the above reasons and the further reasons that the same are indefinite and uncertain, defendants move the Court to strike out all that portion of said Paragraph 8 commencing with the words "that the defendants so managed the affairs" on page 8A and ending

85 at the bottom of Page 8B; and in this regard defendants allege, that said portions asked to be stricken out are indefinite and uncertain in this, to-wit: That it is not stated how defendants managed the affairs and property of the corporation so as to divest the corporation of its property and assets, and it is not stated what suits defendants procured to be instituted by the Western Company, or what judgments were rendered or execution sales thereunder were had to procure the ownership of the property of the Company to be vested in the Western Company, nor by what means said management by the defendants of the affairs of the Turquoise Copper Mining & Smelting Company the stock of said Company became worthless, and because said portions asked to be stricken out are mere conclusions of the pleader and do not state facts.

And the latter portion of the allegations on page 8B are indefinite and uncertain in this, to wit: that it is not stated what kind of a demand was made nor the purpose of it, nor what sort of a suit plaintiffs intended to bring, nor what interest they had to protect, nor even that they had any interest to protect, and no consideration is stated of any promise to reinvest plaintiffs in their rights as they existed prior to November 29th, 1902.

And for the same reasons the defendants move the Court to strike out the whole of Paragraph 9 in said first count.

To save repetition defendants move to strike out all those portions of Paragraphs 3 and 5 which are made parts of plaintiffs' second cause of action in said second amended complaint, and which defendants have moved to strike out in plaintiffs' first cause of action, and for the same reasons alleged in said motion.

86 And for the same reasons defendants move to strike out that portion of Paragraph 2 of plaintiffs' second cause of action commencing with the words "for not less than a sum" on line 11 from top of page 11 down to and including the words "said property" on line 14 of said page, and commencing with the words "and that if the said" on line 20 from top of said page down to the bottom of said page 11.

And to save repetition and for the same reasons hereinbefore alleged, defendants move to strike out all those portions of Paragraphs 8 and 9 adopted in plaintiffs' second cause of action by reference from their first cause of action.

And for the same reasons hereinbefore set forth, to save repetition these defendants move to strike out from the 3rd cause of action all those portions of Paragraphs 3, 5 and 6 and 8 of the 3rd which have been adopted by reference from the first cause of action in plaintiffs' third cause of action, and which defendants move to strike out from the first cause of action.

Defendants move to strike out that portion of Paragraph 2 of plaintiffs' third cause of action commencing on line 2 page 13 with the words "and could have been sold" and ending with the words "indebtedness in full" on line — of said page, for the reason that it is a mere conclusion of the pleader and not a statement of the fact.

And for the same reasons move the Court to strike out that portion of Paragraph 5 commencing on the third line from the bottom of page 15 with the words "plaintiffs' alleged" and ending at the bottom of said page.

87 For the same reasons these defendants move the Court to strike out that portion of Paragraph 6 of the third count in plaintiffs' complaint beginning with the words "and did not mention" on line 5 from top of page 16 and ending with the Paragraph.

To save repetition and for the reasons hereinbefore stated, defendants move to strike out all those portions in Paragraph 9 which are adopted by reference to plaintiffs' third count and which defendants moved to strike out in the first count.

Respectfully submitted,

CHARLES BOWMAN,
BEN GOODRICH,
Attorneys for Defendants.

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(Title Court and Cause).

Second Amended Complaint.

Now come plaintiffs above named and after service thereof on defendants, file this their second amended complaint, and for cause of action against the above named defendants, allege;

First Cause of Action.

I.

That the Turquoise Copper Mining and Smelting Company hereinafter mentioned is, and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the Territory of Arizona.

That the Western Company hereinafter mentioned is, and at all the times hereinafter mentioned was a corporation organized under the laws of the State of California.

II.

That on and prior to the 29th day of November, 1902, and thereafter until divested of its title, as hereinafter set out, the said Turquoise Copper Mining and Smelting Company was the owner of all those certain mines and mining claims situate in the Turquoise Mining District, Cochise County, Territory of Arizona, particularly known and described as follows, to-wit:

The "Tom Scott," a patented mine, the patent for which is recorded in Book 12 of Deeds and Mines, at page 73, in the office of the county recorder of the aforesaid Cochise county.

The "Maxon" mining claim, the location notice of which is recorded in Book 11 of Records of Mines, at page 620, in the same recorder's office.

89 The "tip Top" mining claim, the location notice of which is recorded in Book 11 of Records of Mines, at page 620, in the same office.

The "San Juan" mining claim, the location notice of which is recorded in Book 29 of Records of Mines, at page 468, in the same office.

The "Ann" mining claim, the location notice of which is recorded in Book 14, Records of Mines, at page 485, in the same office.

The "Santiago" mining claim, the location notice of which is recorded in Book 11, of Records of Mines, at page 153, in the same office.

The "West Side" mining claim, the location notice of which is recorded in Book 11 of Records of Mines, at page 243, in the same office.

"The Tip Top No. 2" mining claim, the location notice of which is recorded in Book 12 Records of Mines, at page 125, in the same office.

The "Gladis" mining claim, the location notice of which is recorded in Book 15 of Records of Mines, at page 219, in the same office.

An undivided one-third interest in the "Orange" mining claim, and, an undivided one-third interest in the "Ant" mining claim; and

And undivided one-third interest in the "Kohinoor" mining claim; and

An undivided one-third interest in the "Kohinoor" mining claim,

90 the location notices of all these last four claims are recorded in Book 19 of Records of Mines at pages 173, 171, 168 and 170 respectively.

III.

That on and prior to the aforesaid 29th day of November, 1902, the capital stock of the said Turquoise Copper Mining and Smelting Company was divided into one hundred thousand (100,000) shares of the par value of ten dollars (\$10.00) each, and four-sevenths ($4/7$) of all of said capital stock was owned and controlled by the plaintiffs, and three-sevenths ($3/7$) of all said stock was owned and controlled by the defendants W. S. Tevis and W. H. McKittrick, and that the plaintiffs had expended upon the said property for and concerning their interest in the said corporation the sum of \$87,000, be the same more or less; and that the defendants had similarly expended the sum of \$73,000, be the same more or less.

IV.

That on or about the 31st day of July, 1902, the sheriff of Cochise County, Territory of Arizona, by virtue of an execution issued out of this Honorable Court, in the case of S. H. Bryant and wife against the aforesaid Turquoise Copper Mining and Smelting Company, No. 3017, sold at public auction to one Thomas B. McPherson all of the mines and mining claims in paragraph 3 hereinbefore mentioned and described, and for the sum of twenty-three thousand six hundred and forty-one dollars and nineteen cents (\$23,641.19) and the amount required to redeem said property from said sale was on or about the said 29th day of March, 1902, the sum of \$25,252.60, be the same more or less.

91

V.

That at the time of the said execution sale, and of the entry of the judgment in pursuance whereof said execution was issued, the said company had no money wherewith to pay the amount of the said judgment, or to purchase said property at said sale; and at the time of the said sale it was understood and agreed between the plaintiffs and the said McPherson that if the said McPherson would purchase the said property at said execution sale, he would hold the same in trust for the benefit of himself, to the extent of the amount of said judgment, and for the benefit of the plaintiffs to the extent of the amount of the moneys which had been advanced and expended by them in and about the said properties, which said moneys amounted as aforesaid to the sum of \$87,000., be the same more or less.

VI.

That the defendants were informed of said understanding and agreement between the said McPherson and the plaintiff, and that on or about the 29th day of November, 1902, the defendants represented to the plaintiffs that they were the owners of large and abundant means and property wherewith to redeem said property

from said sale, and that if they were placed in absolute control of the said Turquoise Copper, Mining and Smelting Company and of its property without any interference of the plaintiffs in the business of said corporation, they through their financial ability and that of their friends and associates could and would redeem said property from said sale and sell sufficient stock of the said company

to develop the said property and reimburse the parties hereto
92 the moneys expended by them respectively as aforesaid, and thereafter and induced by and relying upon said representations, at the request of the defendants, and to the end that the defendants might not by reason of said execution sale, lose their interest in the said properties as aforesaid, the plaintiffs agreed that they would enter into a certain contract with the defendants whereby the parties should mutually agree that the capital stock of the said corporation should be changed from its original capitalization of 1,000,000 shares of the par value of one dollar each; that 240,000 shares thereof should be placed in the treasury of the said company to be sold in whole or in part by the defendants, at such price or prices as the Board of Directors might deem advisable, the moneys received from such sale or sales to be used, first, to liquidate the aforementioned judgment, the next \$20,000 thereof to be used to develop the said claims then owned and controlled by said company; that the then officers of the said corporation then representing the interests of the plaintiffs should resign from all office or offices held by them, or any of them, in the said corporation, and that the said defendants Tevis and McKittrick should be allowed to appoint and elect such officers and directors in their place and stead as they might desire. That the said defendants should have a total of 280,500 shares of the capital stock of the said corporation, and these plaintiffs should have as their portion of said capital stock 279,500 shares, and that the remaining 200,000 shares of said stock should be issued to the defendant McKittrick, as trustee, the said stock to be sold for not less than par, and that

the proceeds thereof should be divided between the parties
93 to said contract pro rata until they should be fully reimbursed for the money that had been expended upon such property prior to the making of said contract which said total expenditures amounted to about \$160,000, and that the remainder of said stock should be divided between the parties to the said contract in proportion of 101 to the defendants and 99 to the plaintiffs, and whereby the defendants would further agree that they would undertake an endeavor to sell the treasury stock at a price to be fixed by the directors of the company and for not less than a sum sufficient to provide the funds wherewith to make the aforesaid redemption and at least \$20,000 additional for the purposes of developing the said properties, and whereby the defendants and plaintiffs would further agree to use their best endeavors to sell as much of said 200,000 shares of stock held in trust as aforesaid at not less than par as might be possible, the proceeds thereof to be applied in reimbursing the parties hereto pro rata for the moneys advanced as aforesaid.

And the defendants agreed that in consideration of the plaintiffs executing a contract substantially as aforesaid and complying with the terms thereof, in the event that they should fail within two years after the execution of the said contract to raise by sale of the said treasury stock sufficient funds wherewith to redeem the said judgment and to furnish the said \$20,000 for purposes of development, and should fail out of the proceeds of the sale of said 200,000 shares of stock held in trust to reimburse the plaintiffs in the sum of \$87,000, be the same more or less, expended by the plaintiffs as aforesaid, they, the defendants, would procure the plaintiffs to be reinvested with the same interest in the said properties which they had had prior to the 29th day of November, 1902, and would re-establish the relation and status of the plaintiffs to the said property so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November 1902, and as it would have been if the said contract had never been made. Thereupon, the plaintiffs and defendants did on the 29th day of November, 1902, make and enter into a contract, a copy whereof is hereto annexed, as part of this second amended complaint, and is marked "Exhibit A."

VII.

That after making of said contracts, these plaintiffs performed all the terms thereof to be by them performed, and they and their friends constituting a majority of the Board of Directors of the said Turquoise Copper Mining and Smelting Company, resigned as such directors and as officers and from that time plaintiffs ceased to take any part in the management of the affairs of said corporation, and the defendants Tevis and McKittrick, who were then the remaining directors of said corporation, took complete control of all the business and property of said corporation, and of the books, papers and records thereof, and took all said books, papers and records to Bagersfield, Kern County, State of California, where said defendants then resided, from Wilcox, Cochise County, Arizona, at which place the principal office of said corporation had, prior to the said 29th day of November, 1902, been *transacted*.

That the articles of incorporation of said Turquoise Copper Mining and Smelting Company were duly amended so as to change the capital stock of the said corporation from 100,000 shares at the par value of \$10 per share to one million shares at the par value of one dollar per share; that certificates for 279,500 shares of said stock were issued and delivered to these plaintiffs.

Upon information and belief that 280,500 shares were issued and delivered to the defendants, and that 200,000 were issued and delivered to the defendant McKittrick as Trustee, and 240,000 shares were issued and placed in the treasury.

That the plaintiffs were at all times ready and willing to render their best services and to use their best endeavors to sell the 200,000

shares of stock held in trust by the defendant McKittrick aforesaid. That neither the plaintiffs nor any or either of them at any time sold or attempted to sell or offered for sale any of their individual holdings of stock in the said company.

VIII.

Upon information and belief that the defendants did not within two years subsequent to the 29th day of November, 1902, or at any time out of the moneys received from the sales of treasury stock liquidate the aforementioned judgment or redeem the said property from the said execution sale; but that the defendants did sell said 240,000 shares of treasury stock for a sum not exceeding \$9,500,

and did not apply the said \$9,500, or any part thereof to liquidating the aforementioned judgment or to redeem the said properties from the said execution sale; and that the said defendant McKittrick as trustee or otherwise did not sell nor did the defendants or either of them procure to be sold any of the said 200,000 shares of stock issued to the said McKittrick as trustee as aforesaid, nor did the defendants or either of them, nor did the said McKittrick as trustee or otherwise reimburse the plaintiffs or any or either of them in the sum of \$87,000, expended by the plaintiffs upon the said properties as aforesaid, or in any part thereof, or in any sum whatever.

That shortly after the 29th day of November, 1902, the defendants procured to be elected as directors and officers of said corporation themselves and certain of their associates and employes, who acted as such as requested and directed by the defendants and not otherwise, and that defendants from and after such date by reason and in pursuance of such contract and the control of said directors and officers and the other various acts in fulfilment of said contract as hereinbefore alleged, assumed, had and exercised the full management of the affairs of said corporation and of its property and of the interest of the plaintiffs as the same existed prior to the said 29th day of November, 1902, which interest had been turned over to the defendants as aforesaid to be returned to the plaintiffs as aforesaid at the expiration of two years under the certain conditions hereinbefore set forth and alleged.

That the defendants so managed the affairs and property of the said corporation as to divest the said corporation of all of its property and assets and by means of certain suits procured by defendants to be instituted by the said Western Company, and of judgments therein rendered and execution sales thereunder to procure the ownership thereof and title thereto to be vested in the said Western Company, and that the said Western Company during all of said times was and now is owned and controlled by the defendants, and that by reason of said management of the affairs of said Turquoise Copper Mining and Smelting Company by the defendants its stock became and now is absolutely worthless.

That in the month of May, 1905, prior to said execution sales, plaintiffs had made and were making demand upon defendants as

hereinafter in paragraph IX alleged, and at said time plaintiffs notified defendants that they intended to bring suit to protect their interest, and defendants at said time requested plaintiffs not to bring suit, and assured plaintiffs and agreed with plaintiffs that if they would not then bring suit, they, the defendants, would protect the interest of the plaintiffs, and would see that the same was reinvested in plaintiffs as it had been prior to November 29th, 1902, and plaintiffs relying upon such assurance and agreement of defendants, did not bring suit to protect their interest or at all, and the said Turquoise Copper Mining and Smelting Company thereafter became, by the means aforesaid, divested of its ownership and title in and to its assets and property and the said mining claims.

IX.

On or about the — day of February, 1905, and on many occasions between said date, and during the said year of 1905, and
98 particularly in the month of July, 1905, plaintiffs demanded of the said defendants Tevis and McKittrick, that they cause the plaintiffs to be reinvested with an interest in the said properties, the same as, or equivalent to that which plaintiffs had held prior to the making of the said contract on or about the said 29th day of November, 1902, and the defendants failed and refused to comply with said demand.

X.

Plaintiffs are informed and believe, and therefore allege, that on the said 29th day of November, 1902, the interest of the plaintiffs in the said properties and corporation was, and ever since has been worth the sum of not less than \$200,000.

Second Cause of Action.

I.

Plaintiffs repeat and allege and make a part of the allegations of this second cause of action each and every allegation in paragraphs I, II, III, IV and V of the first cause of action in this second amended complaint set forth, and further allege:

II.

That the defendants were informed of said understanding and agreement between the said McPherson and the plaintiff, and that on or about the 29th day of November, 1902, the defendants represented to the plaintiffs that they were the owners of large and abundant means and property wherewith to redeem said property from said sale, and that if they were placed in absolute control of the said Turquoise Copper Mining and Smelting Company,
99 and of its property without any interference of the plaintiffs in the business of said corporation, they through their financial ability and that of their friends and associates could and

would redeem said property from said sale and sell sufficient stock of the said company to develop the said property and reimburse the parties hereto the moneys expended by them respectively as aforesaid, and thereafter, and induced by and relying upon said representations, at the request of the defendants, and to the end that the defendants might not by reason of said execution sale, lose their interest in the said properties as aforesaid, and on said date, the plaintiffs on the one part and defendants on the other part entered into a contract whereby they agreed that the capital stock of the said corporation should be changed from its original capitalization to 1,000,000 shares of the par value of One Dollar each; that 240,000 shares thereof should be placed in the treasury of the said company to be sold in whole or in part by the defendants at such price or prices as the Board of Directors might deem advisable, the money received from such sale or sales to be used, First, to liquidate the aforementioned judgment; the next \$20,000 thereof to be used to develop the said claims; that the then officers of the said corporation then representing the interests of the plaintiffs should resign from all office or offices held by them, or any of them, in the said corporation, and that the said defendants should be allowed to appoint and elect such officers and directors in their place and stead as they might desire. That the said defendants should have a total of

100 280,500 shares of the capital stock of the said corporation, and these plaintiffs should have as their portion of said capital stock 279,500 shares; and that the remaining 200,000 shares of said stock should be issued to the defendant McKittrick as trustee, the said stock to be sold for not less than par, and that the proceeds thereof should be divided between the parties to said contract pro rata until they should be fully reimbursed for the money that had been expended upon such property prior to the making of said contract, which said total expenditures amounted to about \$160,000, and that the remainder of said stock should be divided between the parties to the said contract in the proportion of 101 to the defendants and 99 to the plaintiffs, and whereby the defendants further agreed that they would undertake and endeavor to sell the said treasury stock at a price to be fixed by the directors of the company, and for not less than a sum sufficient to provide the funds wherewith to make the aforesaid redemption, and at least \$20,000 additional for the purpose of developing the said property, and whereby the parties further agreed to use their best endeavors to sell as much of said 200,000 shares of stock held in trust at not less than par as might be possible, the proceeds thereof to be applied in reimbursing the parties pro rata for the moneys advanced as aforesaid and whereby the defendants further agreed that neither the plaintiffs nor their interest should be liable for any of the expense of operating the said company, and that if the said defendants within two years should fail to raise by sale of the said treasury stock sufficient funds wherewith to make the said redemption and to furnish the said money
101 for purposes of development, then the defendants would procure the plaintiffs to be reinvested with the same interest in the said properties which they had had prior to the 29th day of

November, 1902, and would reestablish the relation and status of the plaintiffs to the said property so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November, 1902, and as it would have been if the said contract had never been made.

Plaintiffs repeat and allege and make a part of the allegations of this second cause of action each and every allegation in paragraphs VII, VIII, IX and X of the first cause of action in this second amended complaint set forth.

Third Cause of Action.

I.

Plaintiffs repeat and allege and make a part of the allegations of this third cause of action each and every allegation in paragraphs I, II, III, IV, V, VI, VII, and VIII of the first cause of action in this second amended complaint set forth, and further allege:

II.

Upon information and belief plaintiffs allege that the said defendants Tevis and McKittrick continued to manage and control the business of the said Turquoise Copper Mining and Smelting Company, and on the — day of March, 1904, sold 32,000 shares of the 240,000 shares placed in the treasury of said corporation as specified in the above contract and agreement, for twenty-five cents 102 per share, and received therefor the sum of \$8,000. That said defendants applied no part of said sum so received to the payment of said indebtedness.

That on or about the — day of June, 1904, and while so in control of said corporation, and acting under the provisions of said agreement, wrongfully and fraudulently, for the purpose of preventing the payment of the indebtedness, so held by said Tevis against said corporation, the defendants caused to be sold at the price of $\frac{3}{4}$ of one cent per share, the remaining 208,000 shares provided in said agreement to be sold for the purpose of paying said indebtedness. That said sale was not made in good faith, for the reasons that said stock was worth and could have been sold for a sum largely in excess of $\frac{3}{4}$ of a cent per share, to-wit: for a sum sufficient to pay the said indebtedness in full; that the pretended purchaser thereof was an employee of the said Tevis, and plaintiffs allege that the pretended purchase of said stock was in fact for the benefit of defendants; that defendants refused just prior to said alleged purchase by said employee to sell said stock to the plaintiffs for less than ten cents per share; that the purpose of defendants in preventing the payment of said indebtedness was to permit the same to be enforced against the property of said corporation, and the property sold, and be bid in by the said defendants or their representatives, for their benefit, and to thereby convert to their own use and benefit all the property of the

said corporation, and the said interest of the plaintiffs in the said corporation.

103 That further in pursuance of such fraudulent and unlawful purpose, the said defendants while having the sole control and management of said corporation, caused said corporation to issue to the said defendant Tevis its five negotiable promissory notes aggregating \$9,300, with interest at ten per cent per annum, compounded semi-annually, and caused the said notes, together with the \$30,000 note above mentioned to be assigned by the said Tevis to the said Western Company. That the said assignment of said notes was made for the sole purpose that said indebtedness might appear, not to be held and owned by the said Tevis, but to be held in the name of an innocent third party, when, in fact, the said indebtedness was actually continued at all times to be virtually and in effect the property of said Tevis.

That said defendants thereupon, having by their fraudulent acts aforesaid, prevented the payment of the said indebtedness caused said Western Company on or about the — day of May, 1905, to bring and prosecute in the Superior Court of Kern County, State of California, against the said Turquoise Copper Mining and Smelting Company, on all said notes; and the said Western Company in said suit obtained a judgement of said Court against the said Turquoise Copper Mining and Smelting Company on the 24th day of May, 1905, for the sum of \$44,078.05.

III.

Upon information and belief that the said defendants procured and caused the said Western Company thereafter and on the 20th day of June, 1905, to bring and prosecute suit in this Court, being case No. 3968, against the said Turquoise Copper Mining and Smelting Company on the aforesaid judgment of the Superior Court of Kern County, California, and thereafter, on July 20th, 1905, the said Western Company in said suit, duly obtained a judgment of this Honorable Court against the said Turquoise Copper Mining and Smelting Company for the sum of \$44,449.93 with costs \$21.35; and thereafter, the said defendants procured and caused an execution on the last mentioned judgment to be duly issued out of this Court to the Sheriff of Cochise County, by virtue of which he, the said Sheriff, on the 12th day of August, 1905, duly and regularly sold all the mines and mining claims mentioned and described in paragraph II of the first cause of action of this second amended complaint for the sum of \$45,825.30 to the said Western Company, and thereafter no redemption having been made from said sale, the said sheriff duly executed to the said Western Company, a deed of all said mines and mining claims, on the 11th day of July, 1906.

IV.

Upon information and belief that said defendants further in pursuance of such fraudulent purpose, and for the purpose of increasing the apparent indebtedness of said Turquoise Copper Mining and Smelting Company caused defendant McKittrick to assert a demand

against said corporation for salary in the sum of \$9,775, alleged to have accrued since said agreement Exhibit A. That it had been agreed and understood by and between the plaintiffs and defendants that there should be no charge made for salaries by the defendants, while the defendants were in control of said corporation.

That on the 20th day of June, 1905, the defendant W. H. McKittrick brought suit in this Honorable Court, being No. 3969, against the said Turquoise Copper Mining and Smelting Company, for the sum of \$9,975, for alleged salary as manager of said corporation, and obtained a judgment against said corporation for the sum of \$9,975, and \$23.45 costs, on which judgment execution was thereafter duly issued to the sheriff of Cochise County, who thereafter on the 12th day of August, 1905, by virtue of said execution duly sold all the said mines and mining claims hereinbefore mentioned to the said Western Company for the sum of \$10,406.

V.

Upon information and belief that plaintiffs are further informed and believe, and therefore allege, that each and every of the judgments and sheriff's sales made to the said Western Company were obtained and made after due process on the said Turquoise Copper Mining and Smelting Company and after default made thereon by said corporation while still under the exclusive control and management of the defendants, and plaintiffs allege that they had no notice or knowledge of said judgments or sales or any of them until long after the 12th day of August, 1905.

VI.

That in the month of May, 1905, and while the said suits by said Western Company were pending, and said judgment about to be obtained, of all of which the said plaintiffs had no knowledge, the said defendants represented to and informed plaintiffs that said Tevis was demanding payment of his money, and did not mention or disclose to plaintiffs the fact of said suit being brought or judgment obtained. That plaintiffs were then demanding that they be reinvested with their interests as existing prior to said agreement Exhibit "A", and defendants then and there requested the plaintiffs not to bring any suit for such purpose, but assured the plaintiffs that the interests of the plaintiffs would be protected. And the said plaintiffs relying upon said assurance of the defendants, made no further investigation or inquiry as to the condition of the affairs of said Turquoise Copper Mining and Smelting Company, and the plaintiffs did not know or discover that the said defendants had converted the property of the said corporation to their own use until after the issuance of said sheriff's deed to the Western Company on July 11th, 1905, but at all times prior thereto relied upon the assurance of the defendants, as above set forth.

VII.

Plaintiffs repeat and allege and make a part of the allegations of this third cause of action, each and every allegation in paragraphs IX and X of the first cause of action in this second amended complaint set forth.

Wherefore, plaintiffs demand judgment against the defendants:

1. That the plaintiffs recover against the defendants the sum of \$200,000 with interest from the 29th day of November, 1904.
2. For such other and further relief as may be just.
3. For costs of this action.

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JAMES REILLY,
GEO. H. NEALE,
J. T. KINGSBURY,
EUGENE S. IVES,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Jepp Ryan being duly sworn deposes and says that he is one of the plaintiffs in the above entitled action. That he has read the foregoing second amended complaint and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

JEPP RYAN.

Subscribed and sworn to before me this 13th day of July 1908.

Subscribed and sworn to before me this 13th day of July A. D. 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk.*
By PHILO WILCOX, *Deputy.*

EXHIBIT A.

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C.

Ryan and E. B. Ryan of Leavenworth, Kansas, parties of
108 the second part.

Witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and

Whereas, the parties of the first part now own and control three sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corpora-

tion, and thereby obtain the full management of the affairs of the said corporation:

Now, therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization to one million shares of the value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the Board of Directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment, held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47 Dollars. Second, to use the next \$20,000 received from the sale of said stock to develop the claims

now owned and controlled by this company; the parties of
109 the second part hereby agree to and with the parties of the first part that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of said last mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000 when the remaining shares shall be divided equally among them according to their respective interest in the ratio aforesaid.

It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust

for all shall have been sold or apportioned, as above set forth.
110 The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second

parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis not being present upon the signing hereof, that ten days' time be allowed him, in which to sign and ratify same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

Witness our hands the day and year first above mentioned.

WILLIAM S. TEVIS,
W. H. MCKITTRICK,
Parties of the First Part.
JEPP RYAN,
THOMAS C. RYAN,
E. B. RYAN,
Parties of the Second Part.

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(Title Court and Cause.)

Third Amended and Supplemental Complaint.

Now come plaintiffs above named, and, after service thereof on defendants, file this their third amended and supplemental complaint, and for cause of action against the above named defendants, allege:

First Cause of Action.

I.

That the Turquoise Copper Mining and Smelting Company, hereinafter mentioned, is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the Territory of Arizona.

That the Western Company hereinafter mentioned is, and at all the times hereinafter mentioned was, a corporation organized under the laws of the State of California.

II.

That on and prior to the 29th day of November, 1902, and thereafter until divested of its title, as hereinafter set out, the said Turquoise Copper Mining and Smelting Company was the owner of all those certain mines and mining claims, situate in the Turquoise Mining District, Chocise County, Territory of Arizona, particularly known and described as follows, to-wit:

The "Tom Scott", a patented mine, the patent for which is recorded in Book 12 of Deeds of Mines, at page 73, in the office of the County Recorder of the aforesaid Cochise County;

The "Maxon" mining claim, the location notice of which is re-

112 corded in Book 11 of the Record- of Mines, at page 620, in the same recorder's office.

The "Tip Top", mining claim, the location notice of which is recorded in Book 11 of Records of Mines, at page 620, in the same office;

The "San Juan" mining claim, the location notice of which is recorded in Book 29 of Records of Mines, at page 468, in the same office;

The "Ann" mining claim, the location notice of which is recorded in Book 14 Records of Mines, at page 485, in the same office;

The "Santiago" mining claim, the location notice of which is recorded in Book 15 Record- of Mines, at page 153, in the same office;

The "West Side" mining claim, the location notice of which is recorded in Book 11 of Records of Mines, at page 243, in the same office.

The "Tip Top No. 2" mining claim, the location notice of which is recorded in Book 12 of Records of Mines, at page 126, in the same office;

The "Gladis" mining claim, the location notice of which is recorded in Book 15 of Records of Mines, at page 219, in the same office;

An undivided one-third interest in the "Orange" mining claim;

An undivided one-third interest in the "Ant" Mining claim;

An undivided one-third interest in the "Kohinoor" mining claim;

An undivided one-third interest in the "International" Mining claim, the location notices of all these last four claims being recorded in Book 19 of Records of Mines at pages 173, 171, 168, and 170, respectively, in the same office.

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III.

That on and prior to the aforesaid 29th day of November, 1902, the capital stock of the said Turquoise Mining and Smelting Company was divided into one hundred thousand (100,000) shares of the par value of ten dollars (\$10.00) *Dollars*, each, and four-sevenths (4-7) of all of said capital stock was owned and controlled by the plaintiffs, and three-sevenths (3-7) of all of said stock was owned and controlled by the defendants, W. S. Tevis and W. H. McKittrick; and that the plaintiffs had expended upon the said property, for and concerning their interest in the said corporation, the sum of \$87,000.00, and that the defendants had similarly expended the sum of \$73,000.00.

IV.

That on or about the 31st day of July, 1902, the sheriff of Cochise County, Territory of Arizona, by virtue of an execution issued out of this Honorable Court, in the case of S. H. Bryant and wife against the aforesaid Turquoise Copper Mining and Smelting Company, No. 3017, sold at public auction to one Thomas B. Mc-

Pherson all of the mines and mining claims in Paragraph II hereinbefore mentioned and described, and for the sum of Twenty-three Thousand Six Hundred and Forty-one Dollars and nineteen cents (\$25,641.19) and the amount required to redeem said property, from said sale was the sum of \$25,252.60.

114

V.

That at the time of the said execution sale, and of the entry of the judgment in pursuance whereof said execution was issued the said company had no money wherewith to pay the amount of the said judgment, or to purchase said property at said sale; and at the time of the said sale it was understood and agreed between the plaintiffs and the said McPherson, that if the said McPherson would purchase the said property at said execution sale, he would hold the same in trust for the benefit of himself, to the extent of the amount of said judgment, and for the benefit of the plaintiffs to the extent of the amount of the moneys which had been advanced and expended by them in and about the said properties, which said moneys amounted, as aforesaid, to the sum of \$87,000.00.

VI.

That the defendants were informed of said understanding and agreement between the said McPherson and the plaintiffs; and that, on or about the 29th day of November, 1902, the defendants represented to the plaintiffs that they were the owners of large and abundant means and property wherewith to redeem said property from said sale, and that if they were placed in absolute control of the said Turquoise Copper Mining and Smelting Company, and of its property, without any interference of the plaintiffs in the business of said corporation, they, through their financial ability and that of their friends and associates, could and would redeem said property from said sale, and sell sufficient stock of the said company to develop the said property and reimburse the
115 parties hereto the moneys expended by them respectively as aforesaid, and thereafter and induced by the defendants, and to the end that the defendants might not, by reason of said execution sale, lose their interest in the said property as aforesaid, the plaintiffs agreed that they would enter into a certain contract with the defendants, whereby the parties should mutually agree that the capital stock of the said corporation should be changed from its original capitalization to one million (1,000,000) shares, of the par value of One Dollar each; that 240,000 shares thereof should be placed in the treasury of the said company, to be sold in whole or in part by the defendants, at such price or prices as the Board of Directors might deem advisable, the moneys received from such sale or sales to be used: First, to liquidate the aforementioned judgment; the next \$20,000.00 thereof to be used to develop the said claims then owned and controlled by said company; that the then officers of the said corporation, then representing the interests of the plaintiffs, should resign from all office or offices

held by them, or any of them, in the said corporation, and that the said defendants, Tevis and McKittrick, should be allowed to appoint and elect such officers and directors in their place and stead as they might desire; that the said defendants should have a total of 280,500 shares of the capital stock of the said corporation, and these plaintiffs should have, as their portion of said capital stock, 279,500 shares, and that the remaining 200,000 shares of said stock should be issued to the defendant McKittrick, as Trustee, the said stock to be sold for not less than par, and that the proceeds thereof

116 should be divided between the parties to said contract pro rata until they should be fully reimbursed for the money that had been expended upon such property prior to the making of said contract, which said total expenditures amounted to about \$160,000.00, and that the remainder of said stock should be divided between the parties to the said contract in proportion of 101 to the defendants and 99 to the plaintiffs, and whereby the defendants would further agree that they would undertake and endeavor to sell the said treasury stock at a price to be fixed by the directors of the company, and for not less than a sum sufficient to provide the funds wherewith to make the aforesaid redemption and at least \$20,000.00 additional, for the purposes of developing the said properties, and whereby the defendants and plaintiffs would further agree to use their best endeavors to sell as much of said 200,000 shares of stock, held in trust as aforesaid, at not less than par, as might be possible, the proceeds thereof to be applied in reimbursing the parties hereto pro rata for the moneys advanced as aforesaid.

And the defendants agreed that in consideration of the plaintiffs executing a contract substantially as aforesaid and complying with the terms thereof, in the event that they should fail, within two years after the execution of said contract, to raise by sale of the said treasury stock, sufficient funds wherewith to redeem the said judgment and to furnish the said \$20,000.00 for the purposes of development; and should fail, out of the proceeds of the sale of said 200,000 shares of stock held in trust, to reimburse the plaintiffs in the sum

117 of \$87,000.00, expended by the plaintiffs as aforesaid, they, the defendants, would procure the plaintiffs to be reinvested with the same interest in the said properties which they had prior to the 29th day of November, 1902, and would re-establish the relation and status of the plaintiffs to the said property, so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November, 1902, and as it would have been if the said contract had never been made. Thereupon the plaintiffs and defendants did, on the 29th day of November, 1902, make and enter into a contract, a copy whereof is hereto annexed, as part of this third amended and supplemental complaint, and is marked Exhibit "A".

VII.

That, after the making of said contract, these plaintiffs performed all the terms thereof to be by them performed, and they and their friends, constituting a majority of the Board of Directors of the Turquoise Copper Mining and Smelting Company, resigned as such directors and as officers; and from that time plaintiffs ceased to take any part in the management of the affairs of said corporation, and the defendants, Tevis and McKittrick, who were then the remaining directors of said corporation, took complete control of all the business and property of said corporation, and of the books, papers and records thereof; and took all said books, papers and records to Bakersfield, Kern County, State of California, where said defendants then resided, from Willcox, Cochise County, Arizona, at which place the principal office of said corporation, had, prior to the said 29th day of November, 1902, been located.

118 That the articles of incorporation of the said Turquoise Copper Mining and Smelting Company were duly amended so as to change the capital stock of the said corporation from 100,000 shares of the par value of \$10.00 per share, to one million shares at the par value of one dollar per share; that certificates for 279,500 shares of said stock were issued and delivered to these plaintiffs; that 280,500 shares were issued and delivered to the defendants, and that 200,000 shares were issued and delivered to the defendant McKittrick, as Trustee, and 240,000 shares were issued and placed in the treasury.

That the plaintiffs were, at all times, ready and willing to render their best services and to use their best endeavors to sell the 200,000 shares of stock held in trust by the defendant McKittrick as aforesaid. That neither the plaintiffs, nor any or either of them, at any time sold or attempted to sell or offered for sale any of their individual holdings of stock in the said Company.

VIII.

That the defendants did not, within two years subsequent to the 29th day of November, 1902, or at any time, out of the moneys received from the sales of treasury stock, liquidate the aforementioned judgment or redeem the said property from the said execution sale; but that the defendants did sell said 240,000 shares of treasury stock for a sum not exceeding \$9,500.00, and did not apply the said \$9,500.00, or any part thereof, to liquidating the aforementioned judgment, or to redeem the said properties from the said execution sale; and that the said defendant McKittrick as

Trustee or otherwise, did not sell, nor did the defendants or
119 either of them procure to be sold, any of the said 200,000 shares of stock issued to the said McKittrick as trustee as aforesaid; nor did the defendants, or either of them, nor did the said McKittrick, as trustee or otherwise, reimburse the plaintiffs or any or either of them in the sum of \$87,000.00, expended by the plaintiffs upon the said properties as aforesaid, or in any part thereof, or in any sum whatever.

That shortly after the 29th day of November, 1902, the defendants procured to be elected as directors and officers of said corporation themselves and certain of their associates and employes, who acted as such as requested and directed by the defendants and not otherwise; and that defendants, from and after such date, by reason and in pursuance of such contract and the control of said directors and officers, and the other various acts in fulfillment of said contract as hereinbefore alleged, assumed, had and exercised the full management of the affairs of said corporation and of its property and of the interest of the plaintiffs as the same existed prior to the said 29th day of November, 1902, which interest had been turned over to the defendants as aforesaid to be returned to the plaintiffs as aforesaid at the expiration of two years, under the certain conditions hereinbefore set forth and alleged.

That the said defendants, while having and exercising the sole and unrestricted management and control of the business and property of the said Turquoise Copper Mining and Smelting Company, did, on — about the — day of January, 1903, pay to the said Thomas B. McPherson, the sum of \$25,262.60, and
120 thereby redeemed the property described in Paragraph II hereof, with their own money or the money of one of them, and between that day and the — day of February, 1905, caused the said Turquoise Copper Mining and Smelting Company, to issue its several, six, promissory notes, aggregating \$39,500.00, with interest thereon at ten per cent per annum, compounded half yearly, to the defendant W. S. Tevis, who thereafter assigned all of said notes to the Western Company, a corporation.

That thereafter the said Western Company brought suit on said notes in the Superior Court of Kern County, State of California, against the said Turquoise Copper Mining and Smelting Company, and obtained a judgment of said Court against the said Corporation for the sum of \$44,098.05; and thereafter, on the 20th day of June 1905, the said Western Company brought suit on said judgment in this Honorable Court, being case No. 3968, against the said Turquoise Copper Mining and Smelting Company, and procured a judgment of this Court against said Turquoise Copper Mining and Smelting Company for the sum of \$44,449.93, with \$21.55 costs; and thereafter execution was issued on said judgment to the sheriff of this county by virtue of which he, the said sheriff, on the 12th day of August 1905, sold to the said Western Company all the mines and mining claims mentioned and described in Paragraph II hereof; and thereafter no redemption having been made from said sale, the said sheriff executed to the said Western Company a deed of all of said mines and mining claims, and thereby
121 said Turquoise Copper Mining and Smelting Company was divested of its title to said mines and mining claims, and its stock became worthless, and these plaintiffs were thereby deprived of their interest and stock in said corporation, to their injury in the sum of \$200,000.00.

That in the month of May, 1905, prior to said execution sales plaintiffs had made and were making demands upon defendants,

that they cause plaintiffs to be reinvested with their interest in the property of said Turquoise Copper Mining and Smelting Company as per the agreement hereinbefore set out, and at said times plaintiffs notified defendants that they intended to bring suit to protect their said interest; and defendants, at said times, requested plaintiffs not to bring suit, and assured plaintiffs and agreed with plaintiffs that if they would not bring suit then, they the defendants would protect the interest of the plaintiffs, and would see that the same was reinvested in plaintiffs as it had been prior to November 29th, 1902; and plaintiffs relying upon such assurance and agreement of defendants, did not bring suit to protect their interest or at all, and the said Turquoise Copper Mining and Smelting Company thereafter became, by the means aforesaid, divested of its ownership and title in and to its assets and property and the said mining claims. That said Western Company during all of said times was and now is owned and controlled by the defendants.

IX.

On or about the — day of February, 1905, and on many occasions between said date, and during the said year of 1905, and particularly in the month of July, 1905, plaintiffs demanded 122 of the said defendants Tevis and McKittrick, that they cause the plaintiffs to be reinvested with an interest in said properties, the same as, or equivalent to that which plaintiffs had held prior to the making of the said contract on or about the said 29th day of November, 1902, and the defendants failed and refused to comply with said demand.

X.

Plaintiffs are informed and believe, and therefore allege, that on the said 29th day of November, 1902, the interest of plaintiffs in the said properties and corporation was, and ever since has been worth the sum of not less than \$200,000.00.

Second Cause of Action.

I.

Plaintiffs repeat and allege and make a part of the allegations of this second cause of action each and every allegation in Paragraphs I, II, III, IV and V of the first cause of action in this third amended and supplemental complaint set forth, and further allege:

II.

That the defendants were informed of said understanding and agreement between the said McPherson and the plaintiff, and that on or about the 29th day of November, 1902, the defendants represented to the plaintiffs that they were the owners of large and abundant means and property wherewith to redeem said property from said sale, and that if they were placed in absolute control of the said

Turquoise Copper Mining and Smelting Company, and of its property without any interference of the plaintiffs in the business
123 of said corporation, they through their financial ability and that of their friends could and would redeem said property from said sale and sell sufficient stock of the said company to develop the said property and reimburse the parties hereto the moneys expended by them respectively as aforesaid, and thereafter, and induced by and relying upon said representations, at the request of the defendants, and to the end that the defendants might not by reason of said execution sale, lose their interest in the said properties as aforesaid, and on said date, the plaintiffs on the one part and defendants on the other part entered into a contract whereby they agreed that the capital stock of the said corporation should be changed from its original capitalization to 1,000,000 shares of the par value of One Dollar each; that 240,000 shares thereof should be placed in the treasury of the said company to be sold in whole or in part by the defendants at such price or prices as the board of Directors might deem advisable, the money received from such sale or sales to be used, First, to liquidate the aforementioned judgment; the next \$20,000 thereof to be used to develop the said claims; that the then officers of the said corporation then representing the interests of the plaintiffs should resign from all office or offices held by them, or any of them, in the said corporation, and that the said defendants should be allowed to appoint and elect such officers and directors in their place and stead as they might desire. That the said defendants should have a total of 280,500 shares of the capital stock of the said corporation, and these plaintiffs should have as their portion
124 of said capital stock 279,500 shares; and that the remaining 200,000 shares of said stock should be issued to the defendant McKittrick as trustee, the said stock to be sold for not less than par, and that the proceeds thereof should be divided between the parties to said contract pro rata until they should be fully reimbursed for the money that had been expended upon such property prior to the making of said contract, which said total expenditures amounted to about \$160,000 and that the remainder of said stock should be divided between the parties to the said contract in the proportion of 101 to the defendants and 99 to the plaintiffs, and whereby the defendants further agreed that they would undertake and endeavor to sell the said treasury stock at a price to be fixed by the directors of the company, "and for not less than a sum sufficient to provide the funds wherewith to make the aforesaid redemption, and at least \$20,000 addition for the purpose of developing the said property," and whereby the parties further agreed to use their best endeavors to sell as much of said 200,000 shares of stock held in trust at not less than par as might be possible, the proceeds thereof to be applied in reimbursing the parties pro rata for the moneys advanced as aforesaid and whereby the defendants further agreed that neither the plaintiffs nor their interest should be liable for any of the expense of operating the said company," "and that if the said defendants within two years should fail to raise by sale of the said treasury stock

sufficient funds wherewith to make the said redemption and to furnish the said money for purposes of development, then the defendants would procure the plaintiffs to be reinvested with the same interest in the said properties which they had had prior to the 29th day of November, 1902, and would re-establish the relation and status of the plaintiffs to the said property so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November, 1902, and as it would have been if the said contract had never been made."

Plaintiffs repeat and allege and make a part of the allegations of this second cause of action each and every allegation in paragraphs VII, VIII, IX and X of the first cause of action in this third amended and supplemental complaint set forth.

And for a Third Cause of Action.

I.

Plaintiffs repeat and allege and make a part of the allegations of this second cause of action each and every allegation in Paragraphs I, II, III, IV and V, of the first cause of action in this third amended and supplemental complaint set forth, and further allege:

II.

That on the 29th day of November, 1902, and before the execution of the agreement marked Exhibit "A" and attached to this complaint, the defendants were informed of the undertaking and agreement between the said McPherson and the plaintiffs, as set out in Paragraph V of the first cause of action herein; and that on or about the 29th day of November, 1902, and before the execution of said agreement, marked Exhibit "A," the defendants represented to the plaintiffs that they were the owners of large and abundant means and property wherewith to redeem said property from said sale, and that if they were placed in absolute control of the said Turquoise Copper Mining and Smelting Company and of its property, without any interference of the plaintiffs in the business of said corporation, they, through their financial ability and that of their friends and associates, could and would redeem said property from said sale and sell sufficient stock of the said company to develop the said property and reimburse the parties hereto the moneys expended by them respectively as aforesaid; and thereafter, and induced by and relying upon said representations, at the request of the defendants, and to the end that the defendants might not, by reason of said execution sale, lose their interest in the said properties as aforesaid, and on said date, the plaintiffs on the one part and the defendants on the other part entered into a contract, whereby they agreed that the capital stock of the said corporation should be changed from its original capitalization to 1,000,000 shares of the par value of One Dollar each; that 240,000 shares thereof should be placed in the treasury of the said company, to be sold in

whole or in part by the defendants, at such price or prices as the Board of Directors might deem advisable, the money received from such sale or sales to be used, First, to redeem from the execution sale mentioned in Paragraph IV of said first cause of action; the next \$20,000 thereof to be used to develop the said claims; that the then officers of the said corporation, then representing the interests
127 of the plaintiffs, should resign from all office or offices held by them, or any of them, in the said corporation, and that the said defendants should be allowed to appoint and elect such officers and directors in their place and stead as they might desire. That the said defendants should have a total of 280,500 shares of the capital stock of the said corporation, and these plaintiffs should have as their portion of said capital stock 279,500 shares; and that the remaining 200,000 shares of said stock should be issued to the defendant McKittrick as trustee, the said stock to be sold for not less than par, and that the proceeds thereof should be divided between the parties to said contract pro rata until they should be fully reimbursed for the money that had been expended upon such property prior to the making of said contract, which said total expenditures amounted to about \$160,000.00, and that the remainder of said stock should be divided between the parties to the said contract in the proportion of 101 to the defendants 99 to the plaintiffs, and whereby the defendants further agreed that they would undertake and endeavor to sell the said treasury stock at a price to be fixed by the directors of the company, and for not less than a sum sufficient to provide the funds wherewith to make the aforesaid redemption and at least \$20,000.00 additional for the purpose of developing the said property, and whereby the parties further agreed to use their best endeavors to sell as much of said 200,000 shares of stock held in trust, at not less than par, as might be possible, the proceeds thereof
128 to be applied in reimbursing the parties pro rata for the moneys advanced as aforesaid, and whereby the defendants further agreed that neither the plaintiffs' nor their interest should be liable for any of the expense of operating the said company, and that if the said defendants within two years should fail to raise, by sale of the said treasury stock, sufficient funds wherewith to make the said redemption, and to furnish the said money for the purposes of development, then the defendants would procure the plaintiffs to be reinvested with the same interest in the said properties which they had had prior to the 29th day of November, 1902, and would re-establish the relation and status of the plaintiffs to the said property, so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November, 1902, and as it would have been if the said contract had never been made, and without any cost to plaintiffs, excepting the expense of selling the 200,000 shares of stock held in trust by the defendant McKittrick for the parties to said agreement.

III.

That thereupon, on the said 29th day of November, 1902, the agreement and contract, a copy of which is attached to this amended and supplemental complaint, and marked exhibit "A" was executed by all the parties thereto, and these plaintiffs and each of them, signed said agreement and contract, relying upon the representations and promises of the said defendants as hereinbefore, in Paragraph II, alleged.

And the articles of incorporation of the said Turquoise Copper Mining and Smelting Company were duly amended so as to
129 change the capital stock from 100,000 shares at the par value of \$10.00 per share, to 1,000,000 shares of the par value of One Dollar per share, and these plaintiffs performed all the terms of the said contract and agreement, to be by them performed, and they and their friends, constituting a majority of the Board of Directors of the said Turquoise Copper Mining and Smelting Company, resigned as such directors and as officers, and from that time plaintiffs ceased to take any part in the management of the affairs of said corporation, and the defendants, Tevis and McKittrick, who were then the remaining directors of the said corporation, took complete control of all the business and property of said corporation, and of the books, papers and records thereof, and took all of the said books, papers and records to Bakersfield, Kern County, State of California, where said defendants then resided, from Wilcox, Cochise County, Arizona, at which place the principal office of said corporation had, prior to said 29th day of November, 1902, been located and the business thereof transacted.

And the said defendants thereupon took absolute control of the business and management of the said company and of its property, without any interference from the plaintiffs, or either of them, and elected or appointed directors and officers of said corporation according to their own choice and selection, and proceeded to manage the business of said corporation and of its property as hereinafter set out.

That, on or about the 26th day of January, 1903, the said defendants did redeem the mines and mining claims described in

Paragraph II of the first cause of action in this complaint,
130 from the sheriff's sale, set out in Paragraph IV of said first cause of action, by paying to P. B. McPherson, the purchaser at said sale, the sum of \$25,262.60 of their own money, or that of one of them, and issuing to the defendant W. S. Tevis the negotiable promissory note of the said Turquoise Copper Mining and Smelting Company for \$30,000.00, with interest at ten per cent per annum, compounded half yearly; and thereafter on or about the 14th day of March, 1904, sold 32,000 shares of the 240,000 shares of the stock of said corporation placed in the treasury of said corporation, as set out in said agreement, a copy of which is attached hereto, marked exhibit "A," for \$8,000.00, and failed to apply the said sum to the payment of the said sum of \$25,262.60, or of any part thereof.

IV.

The plaintiffs are informed and verily believe, and therefore allege the facts to be: That within three months after making the sale of 32,000 shares of the stock of the said Turquoise Copper Mining and Smelting Company for \$8,000.00, to-wit, on the — day of June, 1904, the defendants Tevis and McKittrick, with the intention and for the purpose of making it impossible to sell the remaining 208,000 shares of the said stock, set apart as hereinbefore in Paragraph II of this third cause of action alleged, and with the intention and for the purpose of eventually divesting the said Turquoise Copper Mining and Smelting Company of its title to the mines and mining claims mentioned in Paragraph II of the first cause of action herein, and of eventually vesting the title to

131 said mines and mining claims in themselves, their servants and associates, and thereby defrauding these plaintiffs out of their interest in said mines and mining claims, did make a pretended sale of the said 208,000 shares of said stock to an employee of the defendant W. S. Tevis, for the pretended price of three fourths ($\frac{3}{4}$) of one cent per share, and thereafter and between the 30th day of November, 1903, and the — day of April, 1905, caused five other negotiable promissory notes of the said Turquoise Copper Mining and Smelting Company, aggregating \$9,303.30, to be issued to the defendant W. S. Tevis, all of which said promissory notes, together with the note for \$30,000.00, in Paragraph III of this third cause of action described, were, by the said defendant W. S. Tevis, indorsed to the said Western Company, a corporation of the state of California.

That thereafter, with the intention and for the purpose hereinbefore alleged, the defendants, on the 28th day of April, 1905, caused an action to be brought in the Superior Court of Kern County, State of California, in the name of the said Western Company, against the said Turquoise Copper Mining and Smelting Company on all the said promissory notes, in which action judgment was duly entered in favor of said Western Company and against the said Turquoise Copper Mining and Smelting Company, on the 24th day of May, 1905, for the sum of \$44,078.05; and thereafter, on the 20th day of June, 1905, the said defendants caused an action to be brought in this Honorable Court, being Register No. 3968, in the name of the said Western Company, against the said Turquoise Copper Mining and Smelting Company, on the aforesaid judgment of the Superior Court of Kern
132 County, State of California, in which action a judgment by default was entered in this court on the 20th day of July, 1905, in favor of said Western Company and against the said Turquoise Copper Mining and Smelting Company for the sum of \$44,449.93.

That in the aforesaid action in the Superior Court of Kern County, State of California, summons was duly served on the defendant herein, W. S. Tevis, as Vice-President of the defendant corporation and judgment was rendered by default; and in the action on said judgment, prosecuted in this court, summons was

served on one Pablo B. Soto, who, prior to the 29th day of November, 1902, had been the statutory agent of the said Turquoise Copper Mining and Smelting Company, but had not thereafter been such agent, and plaintiffs had no knowledge, actual or constructive, of said actions or of either of them.

That thereafter said defendants caused and procured an execution on the last named judgment to be issued out of this court, to the sheriff of this County, by virtue of which the said sheriff, on the 12th day of August, 1905, duly sold all the mines and mining claims of the said Turquoise Copper Mining and Smelting company to the said Western Company, for the sum of \$45,825.30; and thereafter, and no redemption from said sale having been made, said sheriff, on the 11th day of July, 1906, executed a deed of all of said mines and mining claims to the said Western Company.

And, further, with the intention and for the purpose hereinbefore alleged, the defendant W. H. McKittrick, on the 20th day of June, 1905, brought another action in this Honorable Court, being Register No. 3969, against the said Turquoise Copper Mining and Smelting Company for the sum of \$9,975.00, for alleged salary as manager of the corporation, and thereafter obtained a judgment of this Court against the said corporation for the said sum of \$9,975.00 and \$23.45 costs, on which judgment execution was issued to the Sheriff of this county, who thereafter, on the 12th day of August, 1905, by virtue of said execution, sold all the mines and mining claims of the said Turquoise Copper Mining and Smelting Company, for the sum of \$10,406.00, to the said Western Company.

That no redemption was made from either of said sheriff's sales, and thereafter, on the 11th day of July, 1906, the said sheriff executed to the Western Company a sheriff's deed of all of the mines and mining claims belonging to the said Turquoise Copper Mining and Smelting Company, described in Paragraph II of the first cause of action herein, and the title to said mines and mining claims became vested in the said Western Company.

That immediately after the title to said mines and mining claims became vested in the said Western Company, and on the 18th day of July, 1906, the defendants, with the intention and for the purpose hereinbefore alleged, with three others, their friends and associates, formed a corporation under the laws of the Territory of Arizona, named the Tejo Mining Company, and from that time and up to this time, and under the name of the The Tehon Mining Company" the said defendants W. S. Tevis and W. H. McKittrick, have possessed, managed, controlled and owned all the mining claims described in the said Paragraph II of the first cause of action herein.

And thereafter, and on the 20th day of July, 1908, and in the furtherance of the purpose and intention hereinbefore alleged, the said defendants procured the said Western Company to convey all the aforementioned and described mines and mining claims to the said Tejon Mining Company.

That from the month of April 1903 until the month of July,

1908, these plaintiffs and each of them were continuously absent from the Territory of Arizona, and had no knowledge, notice or information of any kind about the two suits brought in this court on the 20th of June, 1905, being Register numbers 3968 and 3969, as hereinbefore alleged, nor of either of said suits, nor of the two sheriff's sales made on said judgments, or of either of them, nor of the said sheriff's deed of July 11th, 1905, by which the property of the Turquoise Copper Mining and Smelting Company became vested in the Western Company, until after the advertisement of the execution sale under said judgment

And plaintiffs are further informed and believe, and therefore allege, that the pretended sale of 208,000 shares of the stock of the said Turquoise Copper Mining and Smelting Company, caused by the defendants to be made said employee of the defendant, W. S. Tevis, in June 1904, for three-fourths ($\frac{3}{4}$) of one cent per share was wholly fictitious and made solely for the purpose of divesting the said Turquoise Copper Mining and Smelting Company of its property

135 and of vesting the title to said property in the said defendants as hereinbefore alleged, and for the purpose of cheating and and defrauding these plaintiffs out of their interest in said property, and that said stock was worth a sum greatly in excess of three-fourths of one cent per share, and if the defendants had honestly and faithfully executed the trust reposed in them, as hereinbefore alleged, they could and would have sold the said 208,000 shares of stock for a sum which together with the \$8,000.00 received from the 32,000 shares sold in March, 1904, would be amply sufficient to reimburse defendants for the said sum of \$25,262.60 paid by them in January 1903 to redeem the property of the said Turquoise Mining and Smelting Company from the sheriff's sale of July 31st, 1902.

That the indorsements of the said notes aggregating \$39,303.30, made by the defendant Tevis to the Western Company, were made in order to get the title of the property of the said Turquoise Copper Mining and Smelting Company vested in the said Western Company for the benefit of defendants, and that the said Western Company and the said Tejon Mining Company were used by the defendants as cloaks to hide the title to the said property of the said Turquoise Copper Mining and Smelting Company, so that defendants could have the title to the said property vested in the said Tejon Mining Company for their own benefit; and the said defendants now own substantially all the stock of the said Tejon Mining Company, and do now control, manage and own all of the said mines and mining claims in the name of the said Tejon Mining Company.

136 That on or about the — day of May, 1905, and after the action of the said Western Company against the said Turquoise Copper Mining and Smelting Company, had been commenced, in the Superior Court of Kern County, State of California, these plaintiffs inquired of the defendants herein as to the cause, reason and effect of said action, and were then informed by defendants that said action did not affect the rights of plaintiffs; that the said Western Company was owned and controlled by the defendant W. S. Tevis and members of his family, and that said defendants would

protect the rights of plaintiffs, according to the representations and agreements made between the parties on November 29th, 1902, as hereinbefore, in Paragraph II of this third cause of action, alleged; and plaintiffs, believing and relying on said statements and on the said representations and agreements of November 29th, 1902, and believing that under said statements and agreements neither these plaintiffs nor their interest in the property of said Turquoise Copper Mining and Smelting Company could be affected by any debts, real or fictitious, created by the defendants after the said 29th day of November, 1902, excepting for the four-sevenths ($\frac{4}{7}$) of the sum of \$25,262.60, paid by defendants to redeem the said mines and mining claims from the execution sale made on July 31st, 1902, as hereinbefore in Paragraph IV of the first cause of action herein set out, and therefore plaintiffs made no further inquiry.

That, after two years from the 29th day of November, 1902, had passed, and after plaintiffs were informed that defendants had failed to sell the 240,000 shares of stock of the said Turquoise Copper Mining and Smelting Company for sufficient funds to pay the redemption money advanced by them to redeem the property of said company from the sheriff's sale, in Paragraph II of the first cause of action herein set out; and before the action of the Western Company vs. the Turquoise Copper Mining and Smelting Company, was commenced in Kern County, State of California, to-wit: On the 15th day of February, 1905, plaintiffs informed defendants that they desired to be reinvested of their interest in the property of the said Turquoise Copper Mining and Smelting Company, and that they desired to be restored to their interest in the property of said corporation the same as plaintiffs had prior to the said 29th day of November, 1902; and plaintiffs informed defendants that they were then ready, able and willing to pay to defendants four-sevenths of the sum of \$25,262.60 paid to redeem the property of said corporation from the said sale of July 31st, 1902, and said defendants ignored said request.

That on the 26th day of August, 1906, and within twenty days after plaintiffs had discovered that defendants had, by fraudulent and collusive management of the said Turquoise Copper Mining and Smelting Company and its property, caused the title of said property to be vested in the said Western Company, plaintiffs caused a written demand to be served on the said Western Company and on each of the defendants herein, requesting them to reinvest plaintiffs with their interest in said property, the same as plaintiffs had prior to November 29th, 1902, and the said Western Company and the defendants entirely ignored said request.

That on the 15th day of February, 1905, and at all times since, plaintiffs were ready, able and willing to pay to defendants the four-sevenths ($\frac{4}{7}$) of the sum paid by defendants on the 26th day of January, 1903, to redeem from the sheriff's sale of July 31st, 1902, as set out in Paragraph IV of the first cause of action herein, with legal interest thereon from the date of said payment to the said 15th day of February, 1905, to-wit: the sum of \$16,200.00, provided defendants would cause plaintiffs to be reinvested

with their said four-sevenths interest in the property of the said Turquoise Copper Mining and Smelting Company, as their interest existed before the said 29th day of November, 1902; and plaintiffs are now able, ready and willing to pay said sum to defendants, provided defendants will cause the Tejon Mining Company of which they have control, to issue to plaintiffs four-sevenths of all the capital stock of the said Tejon Mining Company, and plaintiffs allege that defendants can cause said Tejon Mining Company to issue to plaintiffs the four-sevenths of the capital stock of said company.

That by the fraudulent conduct of the said defendants in the managing the business of the said Turquoise Copper Mining and Smelting Company, as hereinbefore alleged, plaintiffs have been defrauded of their four-sevenths interest in the property of the said Turquoise Copper Mining and Smelting Company, which was at all times herein mentioned worth \$200,000.00, to plaintiffs' injury in the said sum of \$200,000.00.

Wherefore, plaintiffs pray for a judgment of this court:

139 First, That plaintiffs do have and recover of and from the defendants W. S. Tevis and W. H. McKittrick the sum of two hundred thousand dollars (\$200,000.00) with legal interest thereon from the commencement of this action, to-wit: the 30th day of November, 1906, and for the costs of this action.

Second. And for such other and further judgment as may seem just in the premises.

EUGENE S. IVES,
NEAL & SUTTER.

Attorneys for Plaintiffs.

TERRITORY OF ARIZONA,

County of Cochise, ss:

James Reilly, being duly sworn, deposes and says: That he is the attorney in fact for plaintiffs in the above and foregoing complaint; that he has read the said complaint and knows the contents thereof; and that the allegations thereof are true in substance and in fact, of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true and affiant makes this affidavit because plaintiffs are all absent from the Territory of Arizona.

JAMES REILLY,

Subscribed and sworn to before me this 1st day of Oct, 1908. My commission expires July 6, 1912.

LEE O. WOOLERY,

Notary Public.

[SEAL.]

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"EXHIBIT A."

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

Witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and

Whereas, the parties of the first part now own and control three-seventh of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

Now, Therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the Board of

Directors of said corporation may deem advisable, and the

- 141 moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47 Dollars. Second, to use the next \$20,000 received from the sale of said stock to develop the claim now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last mentioned shares as possible, at not less than par value and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000 when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.
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It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth. The parties of the second part shall not be liable for any expense con-

needed with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

143 Witness our hands, the day and year first above mentioned.

WILLIAM S. TEVIS,
W. H. McKITTRICK,

Parties of the First Part.

JEPP RYAN,
THOMAS C. RYAN,
E. B. RYAN,

Parties of the Second Part.

(Title Court and Cause.)

Answer to Third Amended and Supplemental Complaint.

Now comes the defendants in the above entitled action, and except and object to plaintiffs' third amended complaint filed herein, and say the same is insufficient in law for this, to-wit:

That it appears on the face of the complaint itself that this court has no jurisdiction over the persons of these defendants nor over the subject matter of the action.

That said complaint on its face fails to show that either of the plaintiffs or either of the defendants reside in Cochise County or in the Territory of Arizona.

That said complaint on its face shows that all of the plaintiffs and all of the defendants are non residents of the Territory of Arizona.

That plaintiffs' third amended complaint does not lay any venue in this court authorizing the court to assume and exercise jurisdiction over the person of defendants or over the subject matter involved in this action.

144 And now comes the defendants, W. S. Tevis and W. H. McKittrick, and say that before and at the time of the commencement of this suit, and of the service of process

herein, and at the time that said defendants made their appearance in said action that they, and each of them resided in Bakersfield, Kern County, California, and that they and each of them now reside and have their respective domiciles in said County of Kern, California, and not in the county of Cochise, Arizona, nor elsewhere in the Territory of Arizona, and they, the defendants, further say that neither of the plaintiffs in the above entitled action at the time of the commencement of this suit and of the service of process herein, and of the appearance of said defendants in said action, resided within the limits of the Territory of Arizona.

Wherefore, these defendants pray judgment whether this Court will take further cognizance of this suit.

CHARLES BOWMAN,
BEN GOODRICH,
Attorneys for Defendants.

TERRITORY OF ARIZONA,
County of Cochise, ss:

W. H. McKittrick, being duly sworn on oath, deposes and says that he is one of the defendants in the above entitled cause, and that the foregoing plea is true in substance and in fact.

W. H. MCKITTRICK.

Subscribed and sworn to before me this 15th day of October, 1908.

145 [SEAL.]

MAY CHAMBERLIN.

My commission expires Sept. 18, 1912.

And further answering, defendants allege that plaintiffs' third amended complaint does not state facts sufficient to constitute a cause of action against these defendants.

1. For special demurrer these defendants say, that that portion of Paragraph VI of plaintiffs' first cause of action in said third amended complaint, to the effect that these defendants represented that they were the owners of large or abundant means of property wherewith to redeem said property from sale, and that if they were placed in absolute control of the Turquoise Copper Mining & Smelting Company and all its property without interference of plaintiffs in the business of said corporation, that they, through their financial ability, and that of their friends and associates, could and would redeem said property from said sale and sell sufficient stock of said Company to reimburse the parties thereto, the moneys expended by them respectively did not relate to any existing fact, but was a statement simply that they would do something in the future, and does not constitute an estoppel.

2. For further special exception to the first count of plaintiffs' third amended complaint, these defendants allege that it appears upon the face of the complaint itself that the action for which plaintiffs pray relief, is based upon the ground of fraud, and that said action was not commenced or prosecuted within one year

after the cause of action accrued, and is barred by the
146 Statute of one year's limitations, Subdivision 5, Paragraph
2945 of the Revised Statutes of Arizona, 1901, as amended
by Act No. 16, approved March 12th, 1903, Session Laws of 1903.

Wherefore they pray that those portions of Paragraph 6 be
stricken out as irrelevant and immaterial.

3. Further answering in this behalf these defendants says, that
said plaintiffs ought not to have and maintain their said action
thereof against them, because they say that their pretended cause
of action is based upon the ground of fraud, and was not com-
menced nor prosecuted within one year after the pretended cause
of action accrued and is barred by Subdivision 5, Paragraph 2945,
of the Revised Statutes of Arizona for 1901 as amended by Act
No. 16, Approved March 12th, 1903, Session Laws of 1903.

4. These defendants say that they have no knowledge or infor-
mation on the subject sufficient to enable them to answer the allega-
tions of plaintiffs in Paragraph 5 of the first count of said third
amended complaint, to the effect that at the time of the sale of
said property under the execution issued in the case of S. H. Bryan
against the Turquoise Copper Mining & Smelting Company, it was
understood and agreed between plaintiffs and McPherson, that if
said McPherson would purchase said property at said execution
sale, or would hold the same in trust for the benefit of himself to
the extent of the amount of said judgment, and for the benefits of
the plaintiffs to the extent of the amount of moneys which had
been advanced and expended by them in and about the said

147 properties, which said moneys amounted to the sum of
\$87,000.00, and placing their denial upon such lack of infor-
mation, they deny said allegations in said Paragraph 5 contained.

5. These defendants deny that they ever were informed or knew
anything of any understanding or agreement between the said
McPherson and plaintiffs, and deny that they or either of them on
or about November 29th, 1902, or any time, represented to plain-
tiffs or either of them that they, the defendants, were the owners
of large or abundant means or property wherewith to redeem said
property from said sale, and deny that they stated if they were
placed in absolute or other control of said Turquoise Copper Min-
ing & Smelting Company and all its property without interference
of plaintiffs in the business of said corporation, that they, through
their financial ability, or for any other reason, or through their
friends or associates, could or would redeem said property from said
sale, or sell sufficient stock of said Company to develop the said
property or reimburse the moneys expended by them on said prop-
erty, and deny that they or either of them thereafter, or at any
time, induced said plaintiffs by any representations whatever, or
requested plaintiffs to the end that defendants might not by reason
of said execution sale lose their interest in said property, induced
plaintiffs to enter into the contract mentioned and described in
said third amended complaint. And they deny that defendants
ever agreed or promised or undertook to sell the treasury stock
mentioned in Paragraph 6 of plaintiffs' first count for a sum not

less than was necessary or sufficient to provide funds where-
148 with to make said redemption and \$20,000.00 or any other
sum additional for the purpose of developing said proper-
ties, or any other sum other than that fixed by the Directors of
said Company.

And these defendants further deny that in consideration of plain-
tiffs' executing said contract, or any consideration whatever, ever
agreed that in the event they should fail within two years after
the execution of said contract to raise by sale of the treasury stock
sufficient funds wherewith to redeem said judgment and to furnish
\$20,000.00 for the purposes of development, and deny that in the
event they should fail, out of the proceeds of sale of said 20,000
shares of the stock held in trust, to reimburse the plaintiffs in the
sum of \$87,000.00, or any other sum alleged to have been expended
by plaintiffs on said property, that they, the defendants, or either
of them, would procure plaintiffs to be reinvested with the same
interest in said properties which they had prior to November 29th,
1902, or would reestablish the relation or status of plaintiffs to said
property so that plaintiffs' relation in and to said property would
be substantially in effect the same as it had been prior to Novem-
ber 29th, 1902, and as it would have been if said contract had
never been made. They allege *that* the true facts in relation to
said contract and the execution thereof to be as follows:

That on or about November 29th, 1902, at a meeting of the
stockholders of the Turquoise Copper Mining & Smelting Com-
pany at Willcox, Arizona, plaintiff Jepp Ryan, his co-defendants
being then and there present and hearing the statement, stated
to defendant McKittrick that he, Jepp Ryan, had procured
149 McPherson to bid in said property at the foreclosure sale
made on the judgment of S. H. Bryan and wife against the
Company, and that he, said McPherson, would hold the title to
the property mentioned in plaintiffs' complaint in himself, and
requested defendant McKittrick to raise the money to redeem from
against said sale. That said defendant McKittrick then and there
stated to him, said Jepp Ryan, that he had not the means him-
self to do so, and would not do so if he had the means, for the
reason that the said plaintiffs Ryan owned four-sevenths of the stock
while he and his associates owned only three-sevenths of the stock,
and that if he and his friends raised the money to redeem against
said sale that it would be for the greater benefit of the Ryans than
for the defendant McKittrick and his associates, and that he would
have no security for the four-sevenths of the money which could
probably be raised and which would represent the interest owned
by the Ryans in case, he defendant and his associates should redeem.

Thereupon the said Jepp Ryan stated to defendant McKittrick
that he would make any kind of a contract that he, defendant Mc-
Kittrick, desired, because McPherson would keep the property and
all the stockholders interested would lose it, and requested defendant
McKittrick to help him to devise some scheme by which the money
could be raised to redeem said property and develop it. And after
further conversation on the subject, the scheme was devised which
is mentioned in the agreement set out in plaintiffs' complaint, and

150 that said agreement was made upon the solicitation of plaintiffs themselves and not at the suggestion or solicitation of the defendants or either of them. That as a matter of fact the defendant Tevis was not present and knew nothing about it until long afterwards.

These defendants deny that plaintiffs ever performed the contract agreed by them to be performed, except that they did resign as Directors and ceased to take any part in the management of the affairs of said corporation after their said resignation.

These defendants deny that they or either of them caused the Articles of Incorporation of the Turquoise Copper Mining & Smelting Company to be amended so as to change the capital stock of said corporation from 100,000 shares of the par value of \$10.00 per share to 1,000,000 shares at the par value of \$1.00 per share, or caused said stock to be issued accordingly; on the contrary these defendants allege that said amendment was made at the meeting of the stockholders of said Company on November 29th, 1902, held at Willecox, at which plaintiffs were present and voted and participated in the vote carrying said amendment.

6. These defendants admit that they did not within two years, or at any time, out of the moneys received from the sales of treasury stock liquidate the S. H. Bryan judgment or redeem said property from said execution sale, and did not apply any of the moneys received from the sale of stock to the liquidation of said judgment or to the redemption of said property from said execution sale, and did not, as Trustee or otherwise, reimburse plaintiffs or any or either of them in the sum of \$87,000.00 alleged to have been expended by plaintiffs upon said properties.

151 In this regard these defendants allege, that it was impossible to sell and that they did not sell a sufficient amount of said stock or realize a sufficient sum of money to satisfy said judgment or redeem said property from said execution sale, they allege that they never agreed to do so, and were under no obligations whatever to do so, that their only obligation and undertaking was to sell so much of said stock as was possible to sell upon the market, which they allege they did; and they allege that they never did agree or promise to reimburse plaintiffs or either of them in any sum whatever out of the sale of the stock; that they were compelled to and did expend the money, about \$9,500.00, received from the sale of 280,000 shares of treasury stock in payment of taxes on said property, in procuring patents for the various claims belonging to the Company, in paying attorneys' fees to procure said patents and other services, in paying for supplies absolutely necessary for the protection of the mines, in paying watchman to take care of the mines, and in pumping the water out of the mines in order that the same might be saved from absolute destruction, and any other expenses which were essential and necessary to keep the property in proper condition as a mining proposition. All at the direction of said Company's Directors.

7. Defendants deny that they ever agreed to turn over to plaintiffs or return to plaintiffs at the expiration of two years the interest

of plaintiffs in said property and in said stock as it existed
152 prior to November 29th, 1902.

8. They deny that they so managed the affairs and property of the said corporation as to divest it of any of its property or assets; and deny that they ever procured any suits to be instituted by The Western Company against said property, or any judgments to be rendered, or execution sales thereunder to be made to procure the ownership thereof, or the title thereof to be vested in the said The Western Company, or for any other purpose; and deny that the said The Western Company at any time was or now is owned or controlled by the defendants or either of them; and deny that by reason of said management of the affairs of the Turquoise Copper Mining & Smelting Company by defendants the stock became worthless, or that plaintiffs have been in any way injured or damaged by any act of theirs.

9. These defendants allege that after the sale of said property mentioned and described in plaintiffs' complaint under the judgment and foreclosure of S. H. Bryan and wife against the Turquoise Copper Mining & Smelting Company and the purchase of said property under said sale by McPherson, that in order to redeem the said property from said sale it became necessary for the Company to procure money from some source; that it was impossible to sell enough stock to secure a sufficient sum of money to make said redemption, and it was impossible to secure the money from any other source than from W. S. Tevis, and that said Tevis in good faith and for the purpose of saving the property of the Company, loaned said money to said Company, and said Company to secure him therefor, executed and delivered to said Tevis its promissory note in the sum of
153 \$30,000.00, which facts were well known to plaintiffs and ratified and approved by them in writing.

That thereafter said Tevis transferred and assigned said notes and other notes executed by said Turquoise Copper Mining & Smelting Company for money borrowed of said Tevis, under the authority of said Company, to The Western Company, and thereafter the said The Western Company reduced said notes to judgment in Kern County, California, and subsequently sued on said judgment in the District Court of Cochise County, Arizona, recovered judgment thereon and said property mentioned in plaintiffs' complaint was sold in satisfaction of said last judgment and no redemption was ever made against the same.

That neither of these defendants were responsible for or in any way liable for the sale of said property and the rendition of said judgments, and that plaintiffs and each of them were fully notified of all these occurrences as they took place. That plaintiffs and each of them had due and timely notice long prior to the date of said judgments and sales, and had ample time to redeem against said sales if they had been so disposed.

10. These defendants and each of them deny that in the month of May, 1905, or at any other time, that plaintiffs notified them or either of them that they intended to bring suit to protect their

interests and deny that defendants or either of them at that time or at any time requested plaintiffs not to bring suit, or assured plaintiffs or agreed with plaintiffs that if they would not bring suit, that they, defendants, would protect the interest of plaintiffs and see that plaintiffs were reinvested in their interest as they
154 existed prior to November 29th, 1902; and deny that plaintiffs relied upon such or any assurances or agreement of defendants; and deny that they did not bring suit to protect their interest on account of any act, agreement or promise of defendants; and deny that by any act of theirs the Turquoise Copper Mining & Smelting Company became divested of its ownership or title in or to its assets or property or said mining claims. They allege that no consideration whatever existed or exists for any such assurance or agreement if the same was ever made.

11. Defendants further deny that the interest of plaintiffs in said property and corporation was on November 29th, 1902, or at any time thereafter, or is now, worth the sum of \$200,000.00, or any sum whatever.

12. These defendants further allege that plaintiffs were notified of every meeting of the stockholders and furnished with copies of the minutes of every meeting of the stockholders and of every meeting of the Directors, and had as much knowledge of the condition of affairs and of the financial condition of the Company and of all sales of stock as defendants, and plaintiffs never protested or objected to any of the proceedings but acquiesced in the same; and defendants deny that the sale of said stock was made without the consent of plaintiff.

Further answering plaintiffs' third amended complaint, and particularly the second cause of action therein, these defendants say that said second count does not state facts sufficient to constitute a cause of action.

1. Defendants further allege that plaintiffs have under-
155 taken to set up their contract, which is their cause of action, in said count contained according to its legal effect, a copy of which contract is attached to their third amended complaint marked Exhibit "A" and made a part thereof. And that it appears on the face of plaintiffs' complaint in said second cause of action set out that they have misstated the terms and provisions of said contract. Wherefore, these defendants say that there is a variance between the cause of action as stated according to its legal effect with the terms of the contract upon which said allegations are based.

Wherefore defendants pray judgment of the sufficiency of said second count and pray that they may be dismissed with their costs.

And for further answer in this behalf these defendants hereby adopt and make the answer to the first cause of plaintiffs' amended complaint their answer to the second count of plaintiffs' amended complaint with the same force and effect as if fully set out.

And defendants for answer to the third cause of action set out in plaintiffs' third amended complaint hereby adopt and make their answer to plaintiffs' first and second causes of action their answer

to plaintiffs' third cause of action as if the same were here fully set out.

1. Defendants deny that in June, 1904, or at any other time, they wrongfully or fraudulently for the purpose of preventing the payment of the indebtedness of the Turquoise Copper Mining & Smelting Company held by Tevis against said corporation these defendants caused to be sold the remaining 208,000 shares of stock provided in said agreement to be sold for the purpose of paying said indebtedness. They allege that said stock was sold in strict accordance with said agreement mentioned in plaintiffs' complaint and at the price fixed by the Board of Directors of said corporation and for the best price obtainable, and for all the stock was worth, and that plaintiffs were notified of the same and acquiesced in the same after full knowledge of the facts; and they deny that said sale was not made in good faith, and deny that said stock was worth or could have been sold for any sum in excess of three-fourths of one *per cent per share*. Deny that the purchaser thereof was an employee of the defendant Tevis, and deny that the purchase of said stock was for the benefit of the defendants or either of them, and deny that they refused prior to said alleged purchase by H. A. Jastro to sell said stock to plaintiffs for less than ten cents per share; deny that they in any way prevented the payment of said indebtedness for the purpose of permitting the said property to be sold or to be bid in by defendants or their representative, or for their benefit or for any purpose or at all; and deny that thereby or by any act of theirs, or either of them, they intended to convert or did convert for their own use or benefit any of the property of the corporation, or the interest of plaintiffs in the same.

They deny that in pursuance of any fraudulent or wrongful purpose they caused said corporation to issue the defendant Tevis its negotiable notes aggregating \$9300.00, or caused the said notes with the \$30,000.00 note mentioned in plaintiffs' complaint, to be assigned by said Tevis to said Western Company. They deny that said assignment was made for the purpose of having said indebtedness appear not to be held and owned by said Tevis and for the purpose of having the same to appear to be held by an innocent third party; and they deny that such indebtedness was actually in effect the property of said Tevis or continued to be the same after the assignment of said notes to said Western Company. And they deny that they or either of them have any interest whatever or have had since the sale made by decree of the Court in the case of Western Company vs. Turquoise Copper Mining & Smelting Company, except a leasehold in said mining property held by defendant McKittrick, which expired on the 18th of July, 1908.

2. These defendants deny that by their fraudulent or any acts they have prevented the payment of said indebtedness, or caused said Western Company at any time to bring or prosecute any suit in court in the State of California or elsewhere against the Turquoise Copper Mining & Smelting Company on all or any of said notes.

3. These defendants deny that they or either of them procured or caused the said Western Company at any time to bring or prose-

cute suit in this court against the said Turquoise Copper Mining & Smelting Company on any judgment of any court of the State of California, and deny that they at any time caused or procured the said Western Company to issue execution on any judgment whatever out of any court to the sheriff of Cochise County, or any other one, by virtue of which the said sheriff at any time sold the mines
158 and mining claims mentioned and described in plaintiffs' complaint for any sum of money.

4. They deny that in pursuance of any fraudulent or other purpose, or for the purpose of increasing the indebtedness of the Turquoise Copper Mining & Smelting Company they caused defendant McKittrick to assert a demand against the said corporation for salary in the sum of \$9775.00, and they deny that it was agreed or understood by and between plaintiffs and defendants that there should be no charge made for salaries by defendant McKittrick while defendants were in control of said corporation. They admit that said McKittrick did assert a demand against said corporation for salary in the sum mentioned in plaintiffs' third cause of complaint, but allege that it was for services rendered as General Manager of the Company under employment by the Board of Directors.

5. These defendants further deny that plaintiffs had no notice or knowledge of said judgments or sales until after the 12th day of August, 1905; on the contrary these defendants allege that they had notice shortly after the actions were brought and were kept advised of all the proceedings, and that copies of the proceedings of every meeting of the stockholders and of every meeting of the Directors were furnished to them besides information contained in personal letters written by defendant McKittrick as Secretary of the Company, and they had as much knowledge of the condition of affairs and of the financial situation of the Company, of the sales of stock, of the disposition of the funds, and of the judgments, and of the sales
159 of property under the judgments as these defendants had, and never protested or objected to any of the proceedings but acquiesced in the same; and defendants also deny that the sale of said stock was made without the knowledge or consent of plaintiffs. They deny that while the suits of the Western Company were pending and judgments about to be obtained, that plaintiffs had no notice of the same.

6. These defendants deny that they ever assured plaintiffs that their interests would be protected; and deny that plaintiffs relied upon any assurance of defendants to that effect, or that they were induced to make no further investigation or inquiry as to the condition of the affairs of said Company; and deny that they ever converted the property of said corporation to their own use or that plaintiffs at any time relied upon any act or assurances of defendants in regard to the same; and deny that plaintiffs ever had any right to institute any cause of action against said Company or against either of these defendants to set aside, vacate, or to protect themselves against the judgments and mortgages mentioned and described in their complaint.

The defendants admit that after the title to the said mines and

mining claims became vested in the Western Company by reason of the sale of same under the judgment of said Western Company against the Turquoise Company, defendants and others did form a corporation under the laws of the Territory of Arizona, named the Tejon Mining Company, but they deny that the said corporation was formed with the intention of any of the purposes alleged in plaintiffs' complaint, and deny that from that time up to this time that these defendants have possessed, managed, controlled or owned all of the said mining claims described in plaintiffs' amended complaint, either under the name of the Tejon Mining Company, or any other name or at all.

They also deny that on July 20, 1908, or at any other time or for any purpose or with any intention whatever to injure, wrong or defraud plaintiffs or for any of the purposes and intentions alleged in plaintiffs' third amended complaint, they procured the said Western Company to convey said lines to the Tejon Mining Company.

They deny that plaintiffs had no knowledge, notice or information about the two suits brought in this Court, Register Nos. 3968-3969, and deny that plaintiffs had no notice or knowledge of the judgment or execution in said suits or of the sheriff's sale made under said judgment or of the sheriff's deed made July 11, 1905.

On the contrary these defendants allege that these plaintiffs had full knowledge of all these things.

They deny that the sale of 208,000 shares of stock of the Turquoise Copper Mining & Smelting Company was fictitious or that it was made for the purpose of divesting the Turquoise Mining & Smelting Company of its property or for the purpose of vesting the title to said property in these defendants, or for the purpose of cheating or defrauding plaintiffs out of their interests in said property, and deny that said stock was worth any sum in excess of three-quarters of one

cent per share and deny that the same could or would have been sold for any sum in excess of what said stock was sold for or that the sum realized from the sale was sufficient to reimburse defendants in the sum of \$25,262.60 paid by them to redeem the said property from the sheriff's sale on July 31, 1902.

They deny that the endorsements of the notes aggregating \$39,303.30 made by defendant Tevis to the Western Company were made in order to get the title of the property of the Turquoise Mining & Smelting Company vested in the Western Company for the benefit of defendants, and deny that the Western Company and Tejon Mining Company were used by defendants as cloaks to hide the title to said property of the said Turquoise Copper Mining & Smelting Company in order that defendants might have the titles to said property vested in the Tejon Mining Company for their benefit.

Deny that plaintiffs were at any time informed by defendants that said action brought in Kern County, California, did not effect the rights of plaintiffs.

Deny that the said Western Company was owned or controlled by defendant Tevis and members of his family, and deny that defendants ever stated, agreed, promised or intimated that they would pro-

fect the rights of plaintiffs according to the representations and agreements made between the parties on November 29, 1902, as stated in paragraph two of the third cause of action alleged, or according to the representations or agreements made between plaintiffs and defendants at any time, and deny that plaintiffs believed or relied upon any statements, representations or agreements of date

November 29, 1902 or any other date, and deny that plaintiffs believed that under such statements or agreements, or under any statements or agreements that they or their interests in the property of the Turquoise Copper Mining & Smelting Company could be effected by any debts, real or fictitious, created by defendants after November 29, 1902, except the four-sevenths of the \$25,262.60 paid by defendants to redeem the said mines and mining claims from execution sale made July 31, 1902, and deny that defendants ever created any indebtedness as alleged, and deny that plaintiffs by reason of anything that these defendants did or said were induced to make no further inquiry into the matter. On the contrary allege that they had full knowledge of the facts.

Deny that plaintiffs ever informed defendants that they were at any time ready, able or willing to pay to defendants four-sevenths of \$25,262.60 paid by defendants to redeem said property from the sale of July 31, 1902, and deny that as a matter of fact plaintiffs ever were ready, able or willing to pay said or any sum for the purpose of redeeming said property.

Deny that defendants by fraudulent or collusive management, or any other management of the Turquoise Mining & Smelting Company caused the title of said property to be vested in the Western Company.

The defendants also deny that upon information and belief that plaintiffs are now able, ready or willing to pay any sum to defendants conditioned that defendants will issue to plaintiffs four-sevenths of the capital stock of the Tejon Mining Company, and deny that they, defendants, can cause said Mining Company to issue to plaintiffs four-sevenths of the said stock of the said Mining Company.

Deny any fraudulent conduct on their part in the management of the business of the Turquoise Copper Mining & Smelting Company, and deny that thereby plaintiffs have been defrauded of any interests in the property of said Company, and deny that the same is now or at any time has been worth \$200,000.00 or that plaintiffs have been injured in the sum of \$200,000.00 or any sum whatever, and

For further answer in this behalf these defendants deny all and singular the allegations in plaintiffs' complaint contained, except as herein admitted, modified or explained.

Wherefore the defendants pray that plaintiffs recover nothing by their action and that defendants go hence without day and recover their costs in this behalf incurred or expended and for general relief.

CHARLES BOWMAN,
BEN GOODRICH,

Att'ys for Def'ts.

TERRITORY OF ARIZONA,

County of Cochise, ss:

W. H. McKittrick being first duly sworn, deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer to the third amended complaint of plaintiffs, and knows the contents thereof; that the same is true in substance and in fact except as to those matters stated on information and belief and as to such matters he believes it to be true.

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W. H. MCKITTRICK.

Subscribed and sworn to before me this 15 day of October, 1908.

[SEAL.]

MAY CHAMBERLIN,

Notary Public in and for Cochise County, Arizona.

My commission expires Sept. 18, 1912.

(Title Court and Cause.)

Notice of Application for Change of Venue.

To Messrs. W. S. Tevis and W. H. McKittrick and to Ben Goodrich, Esq., and Chas. Bowman, Esq., Att'ys:

Take notice that an application for a change of venue will be made on the 21st of September, 1908, in the above entitled cause or as soon thereafter as counsel can be heard.

JAS. REILLY,

IVES, NEAL & KINGSBURY.

Received a copy of the above notice this 16th day of September, 1908.

CHARLES BOWMAN,

BEN GOODRICH,

Att'ys for W. S. Tevis and W. H. McKittrick, Def'ts.

165

(Title Court and Cause.)

Affidavit.

STATE OF CALIFORNIA,

County of Ventura, ss:

Jepp Ryan being duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that deponent has cause to believe, and does believe, that on account of the bias and prejudice of the Hon. Fletcher M. Doan, he cannot obtain a fair and impartial trial in the above entitled action.

JEPPI RYAN.

Subscribed and sworn to before me this 14th day of September, 1908.

[SEAL.]

H. M. TURNER,

Notary Public.

My commission expires September 6th, 1910.

166 Jan. 7th, 1908, October Term, A. D. 1908.

TUESDAY, *January 7th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Chochise, Convened Pursuant to Recess at 9:30 a. m.

Present:

Hon. Fletcher M. Doan, Judge.

F. W. Shelly, Dis. Att'y.

J. F. White, Sheriff.

J. W. Walker, Reporter.

Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to Law.

4368.

JEPP RYAN et al.

VS.

THE WESTERN Co. et al.

Counsel for the respective parties hereto present, comes now counsel for the defendants herein and moves the Court for an order requiring plaintiffs to give bond for security for costs, which motion was by the Court granted, and plaintiff was given ten days in which to file said bond.

It is ordered that Court do now stand at recess until 1:30 P. M. this day.

4368.

JEPP RYAN et al.

VS.

WESTERN COMPANY et al.

APRIL 1ST, 1908.

On motion of S. L. Pattee, Esq., it is by the Court ordered that the appearance and demurrer of defendant Western Company be stricken from the files in this case and that said S. L. Pattee, Esq., be allowed to withdraw as counsel for said defendant.

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4368.

JEPP RYAN et al.

VS.

THE WESTERN Co. et al.

APRIL 6TH, 1908.

On motion of Eugene S. Ives, Esq., it is by the Court ordered that the name of H. L. Packard, Esq., be and it is hereby withdrawn and stricken from the records of this case as counsel.

April 29th, 1908, April Term, A. D. 1908.

WEDNESDAY, *April 29th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, Convened Pursuant to Recess at 9:30 a. m.

Present:

Hon. Frederick S. Nave, Presiding Judge.

F. W. Shelly, Dist. Att'y.

J. F. White, Sheriff.

J. W. Walker, Reporter.

Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

4368.

JEPP RYAN et al.

vs.

WESTERN Co. et al.

Comes now plaintiff and demands a trial by jury in this case which request is by the Court granted.

168 May 27th, 1908, April Term, A. D. 1908.

WEDNESDAY, *May 27th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, Convened Pursuant to Recess at 9 a. m.

Present:

Hon. Fletcher M. Doan, Judge.

F. W. Shelly, Dist. Att'y.

J. F. White, Sheriff.

J. W. Walker, Reporter.

Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

4368.

JEPP RYAN et al.

vs.

WESTERN Co. et al.

On motion of James Reilly, Esq., for plaintiff, it is by the Court ordered that the case against the defendant Western Company, be and the same is hereby dismissed.

4368.

JEPP RYAN et al.
vs.
WESTERN Co. et al.

JUNE 4TH, 1908.

On motion of plaintiff, it is ordered that this case be and the same is hereby set for July 14th, 1908.

4368.

JEPP RYAN et al.
vs.
THE WESTERN Co. et al.

JUNE 20TH, 1908.

169 By consent of parties herein, it is by the Court ordered that the hearing on law points in this case be and the same is hereby set for July 11th, 1908.

4368.

JEPP RYAN et al.
vs.
WESTERN Co. et al.

JULY 11TH, 1908.

Plaintiffs herein being present by counsel, J. T. Kingsbury, Esq., Jas. Reilly, Esq., and Mess. Eugene S. Ives and Geo. H. Neale, and the defendants being present by their counsel Mess. Pickett & Bowman and Ben Goodrich, Esq. Comes now counsel for defendants and present their demurrer to the amended complaint herein, which said demurrer was by the Court sustained and leave to amend granted. Case ordered set for July 15th, 1908.

4368.

JEPP RYAN et al.
vs.
WESTERN Co. et al.

JULY 15TH, 1908.

By consent of counsel herein, it is by the Court ordered that this case be and the same is hereby continued for the term.

4368.

JEPP RYAN et al.

vs.

THE WESTERN COMPANY, W. S. TEVIS, & W. S. MCKITTRICK.

OCTOBER 2, 1908.

Comes now plaintiff herein by its counsel James Reilly and J. T. Kingsbury, Esq., and moves Court for a change of venue
 170 herein, and it appearing to the Court that the application herein is accompanied by proper affidavits, it is by Court ordered that this case be and the same is hereby changed from this County to the County of Maricopa for trial.

October 28, 1908, October Term, 1908.

4368.

JEPP RYAN et al.

vs.

THE WESTERN Co. et al.

By consent of counsel herein, it is by the Court ordered that this case be changed to the 3d Judicial District of the Territory of Arizona, for trial.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial Dist. of the Territory of Arizona, in and for Cochise County do hereby certify that the above and foregoing is a true and correct transcript of the minutes entered in the case entitled Jepp Ryan, et al. vs. The Western Company et al.

Witness my hand and the seal of said Court this 2nd day of November, 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk.**Statement of Costs, Above Case.*

Plaintiffs' costs \$19.80; Defendants' costs \$6.00.

171

(Title Court and Cause.)

Motion to Strike Out.

Now come the defendants in the above entitled action and move and pray the Court to strike out that portion of Paragraph 3 in the first count of plaintiffs' third amended complaint beginning on Line 8 with the words, "and that the plaintiffs had expended" and ending

with the paragraph, because the same is irrelevant and redundant, and constitutes no part of a cause of action;

And for the same reason defendants move to strike out all that portion of Paragraph 5 of the first count in said third amended complaint, beginning on the 4th line of said paragraph with the words, "and at the time of the said sale it was understood" down to the end of said paragraph.

And for the same reasons move the Court to strike out all that portion of Paragraph 6, commencing at the beginning of said paragraph and ending with the words, "as aforesaid" on the 13th line of said paragraph. And all that portion of said Paragraph 6 commencing with the words, "and for not less than a sum" on the 21st line from the top of page 5 down to and including the words, "developing the said properties" on line 24 of said page 5.

And for the same reasons move the Court to strike out all that portion of Paragraph 6 of said third amended complaint, beginning with the words, "and the defendants agreed" on line 30, page 5, and ending with the words, "had never been made" on line 15 of page 6.

172 And for the same reasons move the Court to strike out all that portion of Paragraph 8 of said third amended complaint beginning with the words, "that the defendants did not" on line 20 of page 7, and ending with the word, "sale" on line 24 of said page.

And for the same reasons move the Court to strike out all that portion of Paragraph 8 of said third amended complaint, beginning with the words, "and that the said defendant McKittrick" on the 9th line of said paragraph, page 7, and ending at the bottom of the page.

And for the same reasons move the Court to strike out all that portion of Paragraph 8 on page 8, commencing with the words, "and of the interests of the plaintiffs" on the 15th line and ending with the words, "and alleged" on the 20th line of said page.

And for the above reasons and the further reasons that the same are indefinite and uncertain, defendants move the Court to strike out all that portion of said Paragraph 8, commencing with the words, "that the said defendants" on line 21, page 8, and ending with said paragraph on page 10, and in this regard defendants allege, that said portions asked to be stricken out are indefinite and uncertain in this, to-wit: That it is not stated how defendants managed the affairs and property of the corporation so as to divest the corporation of its property and assets, and it is not stated what suits defendants procured to be instituted by the Western Company, or what judgments were rendered or execution sales thereunder were had to procure the ownership of the property of the Company to be
173 vested in the Western Company, nor by what means said management by the defendants of the affairs of the Turquoise Copper Mining & Smelting Company the stock of said Company became worthless, and because said portions asked to be stricken out are mere conclusions of the pleader and do not state facts.

And that portion of the allegations of Paragraph 9, on page 10 are indefinite and uncertain in this, to-wit: That it is not stated what

kind of a demand was made nor the purpose of it, nor what interest they had to protect, nor even that they had any interest to protect, and no consideration is stated of any promise to reinvest plaintiffs in their rights as they existed prior to November 29th, 1902.

And for the same reasons the defendants move the Court to strike out the whole of Paragraphs 9 and 10 in said first count.

To save repetition, defendants move to strike out all those portions of Paragraphs 3 and 5 which are made parts of plaintiff's second cause of action in said third amended complaint, and which defendants have moved to strike out in plaintiffs' first cause of action, and for the same reasons alleged in said motion.

And for the same reasons defendants move to strike out that portion of Paragraph 2 of plaintiffs' second cause of action, commencing with the words, "and for not less than a sum" on line 10 from top of page 12, down to and including the words, "said property" on line 13 of said page, and commencing with the words, "and that if the said" on line 19 from top of said page 12, down to and including line 30 of said page 12.

174 And to save repetition and for the same reasons hereinbefore alleged, defendants move to strike out all those portions of Paragraphs 8, 9 and 10 adopted in plaintiffs' second cause of action by reference from their first cause of action.

And for the reason that the same is at variance with the terms of the written contract set forth in plaintiffs' third amended complaint, marked Exhibit "A", these defendants move to strike out all of Paragraph 2 set forth in the second cause of action in plaintiffs' third amended complaint.

And for the same reasons hereinbefore set forth, to save repetition these defendants move to strike out from the third cause of action all those portions of Paragraphs 3 and 5 of the third, which have been adopted by reference from the first cause of action in plaintiffs' third cause of action, and which defendants move to strike out from the first cause of action.

And for the same reason hereinbefore set forth, and the further reason that the same is at variance with the terms of the written contract, which is made a part of plaintiffs' complaint, marked Exhibit "A", these defendants move to strike out from the third cause of action all of Paragraph 2 of plaintiffs' third amended complaint.

And for the reason that the same is at variance with the terms of the written contract attached to plaintiffs' third amended complaint, marked Exhibit "A", these defendants move to strike from the third cause of action set forth in plaintiffs' third amended complaint all of that portion of Paragraph 4 thereof, commencing at the beginning of the said paragraph, and ending with the words, "cent
175 per share" on line 18 of said paragraph.

And for the reason that the same is irrelevant, immaterial and redundant, these defendants move to strike from the third cause of action set forth in plaintiffs' third amended complaint all that portion of Paragraph 4 thereof, beginning with the words, "that on the 15th day of November, 1905" on line 7 from the top of page 23,

and ending with the words, "stock of said Company" on line 24 of said page.

To save repetition and for the reasons hereinbefore stated, defendants move to strike out all that portion of Paragraph 4 of the said third cause of action, beginning with the words, "which was" in line 5 from the bottom of page 23, and ending with the figures "\$200,000.00" on line 4 from the bottom of page 23 in plaintiffs' third amended complaint.

Respectfully submitted,

BEN GOODRICH,
CHARLES BOWMAN,
Attorneys for Defendants.

(Title Court and Cause.)

Verdict.

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiffs and assess their damages at \$132,000.00.

R. STILL, *Foreman.*

176 In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs,

vs.

W. S. TEVIS and W. H. MCKITTRICK, Defendants.

Judgment.

This cause coming on regularly for trial on the 21st day of December, 1908, before the court and a jury duly impanelled and sworn, the plaintiffs appearing in person and by Eugene S. Ives, Neale & Sutter, Frank Cox, and J. T. Kingsbury, their attorneys; and the defendants appearing in person and by Ben Goodrich, Charles Bowman, and A. C. Baker, their attorneys; and the respective parties having introduced their evidence, and the cause having been submitted to the jury for its verdict, and the said jury having, on the 24th day of December, 1908, returned into the court their verdict in favor of plaintiffs and against defendants, for the sum of One Hundred Thirty-two Thousand (\$132,000) Dollars.

Now therefore, it is ordered and adjudged by the Court, that plaintiffs do have and recover from the defendants the sum of One Hundred Thirty-two Thousand (\$132,000) Dollars, together with their costs of suit, herein taxed at the sum of \$—, which sum shall bear interest at the rate of six per cent per annum from the date hereof until paid, and that the plaintiffs have execution therefor.

Dated this 24th day of December, 1908.

EDWARD KENT,
Judge District Court.

177

(Title Court and Cause.)

Now comes the Defendants in the above entitled action and moves the Court to set aside the verdict and judgment in the above entitled action for the following reasons and upon the following grounds to-wit:

1. The Court erred in admitting evidence at the trial for Plaintiff.
2. The Court erred in rejecting evidence for the Defendants at the trial.
3. The Court erred in charging the Jury on questions of law.
4. The evidence does not sustain either the judgment or the verdict.
5. The evidence is insufficient to sustain either the verdict or judgment.

BEN. GOODRICH,
CHARLES BOWMAN,
A. C. BAKER,

Attorneys for Defendants.

(Title Court and Cause.)

Come now the above named plaintiffs and move the court for an order amending and correcting the order for judgment and the judgment heretofore signed and filed herein, by adding thereto, "and judgment against the Pacific Surety Company a corporation, surety upon the bond given to replevy certain property levied upon upon a writ of attachment issued herein, for the sum of 178 \$104,900, and interest thereon, at the legal rate, since the date of such bond, in accordance with the judgment presented herewith, a copy of which is attached hereto."

Dated, January 11th, 1909.

NEALE & SUTTER,
EUGENE S. IVES,
J. T. KINGSBURY,

Attorneys for Plaintiffs.

(Title Court and Cause.)

Judgment.

This cause coming on regularly for trial on the 21st day of December, 1908, before the Court and a jury duly impanelled and sworn, the plaintiffs appearing in person and by Eugene S. Ives, Frank Cox, Neale & Sutter and J. T. Kingsbury, their attorneys, and the defendants appearing in person and by Ben Goodrich, Charles Bowman and A. C. Baker, their attorneys; and the respective parties having introduced their evidence, and the cause having been submitted to the jury for their verdict, and the said jury having, on the 24th day of December, 1908, returned into court their verdict in favor of the plaintiffs and against the defend-

ants for the sum of One Hundred and Thirty-two Thousand Dollars (\$132,000.00);

Now therefore, it is ordered and adjudged by the Court that the plaintiffs do have and recover of and from the said defendants, and each of them, the sum of One Hundred and Thirty-two Thousand Dollars (\$132,000.00), together with their costs of suit, herein taxed at the sum of — Dollars (\$—), which sums shall bear 179 interest at the rate of six per cent per annum from the date hereof until paid, and that the plaintiffs have execution therefor.

And it appearing to the court that a writ of attachment was heretofore issued herein and levied upon certain property of the defendants, and that thereafter the property so attached was replevied by giving bond for the value of such property, estimated at the sum of One Hundred and Four Thousand, Nine Hundred Dollars, (\$104,900.00), it is therefore, further

Ordered, adjudged and decreed that said plaintiffs do have and recover of and from the Pacific Surety Company, a corporation, the surety named in the bond given to replevy said attached property, the sum of One Hundred and Four Thousand, Nine Hundred Dollars (\$104,900.00), with interest thereon at the rate of six per cent per annum since the — day of — 190—, the date of said bond, and that plaintiffs have execution therefor.

Dated this — day of —, 190—.

— —, Judge.

(Title Court and Cause.)

TERRITORY OF ARIZONA,

County of Pima, ss:

Eugene S. Ives, being duly sworn, deposes and says; that he is one of the attorneys for the plaintiffs in the above entitled action, 180 and was present and participated in the trial thereof. That upon the rendition of the verdict in such cause a judgment was prepared as affiant is informed and believes by one of his associate counsel, and presented to and signed by the Judge presiding at said trial; that in the preparation of said judgment, as affiant is informed and believes, the fact that a bond had been given by the defendants to replevy certain property levied upon under writ of attachment issued herein, was overlooked and for that reason the judgment as prepared and signed by the Judge, did not contain any judgment against the surety upon the bond given to replevy said property.

Affiant further says that he is advised by the Clerk of this court that the Pacific Surety Company, a corporation, is the surety upon said bond which was given for the estimated value of the property so levied upon, to-wit, the sum of \$104,900, and that by oversight as aforesaid, judgment against said Pacific Surety Company was not included in the judgment as written and signed by said Judge.

Wherefore, affiant prays that the judgment heretofore rendered

herein be amended by adding thereto, "judgment against said Pacific Surety Company as surety upon said bond for said sum of \$104,900, with interest thereon, at the legal rate from the date of said bond.

EUG. S. IVES.

Subscribed and sworn to before me this 9 day of January, 1909.
My commission expires May 9, 1911.

[SEAL.]

JOSIE B. HENDERSON,

Notary Public.

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(Title Court and Cause.)

Judgment.

This cause coming on regularly for trial on the 21st day of December, 1908, before the Court and a jury duly impanelled and sworn, the plaintiffs appearing in person and by Eugene S. Ives, Frank Cox, Neale & Sutter and J. T. Kingsbury, their attorneys, and the defendants appearing in person and by Ben Goodrich, Charles Bowman and A. C. Baker, their attorneys; and the respective parties having introduced their evidence, and the cause having been submitted to the jury for their verdict, and the said jury having, on the 24th day of December, 1908, returned into court their verdict in favor of the plaintiffs and against the defendants for the sum of One Hundred and Thirty-two Thousand Dollars (\$132,000.00);

Now therefore, it is ordered and adjudged by the Court that the plaintiffs do have and recover of and from the said defendants, and each of them, the sum of One Hundred and Thirty-two Thousand Dollars (\$132,000.00), together with their costs of suit, herein taxed at the sum of Two hundred thirty-eight & 20/100 Dollars (\$238.20), which sums shall bear interest at the rate of six per cent per annum from the date hereof until paid, and that the plaintiffs have execution therefor.

And it appearing to the court that a writ of attachment was heretofore issued herein and levied upon certain property of the defendants, and that thereafter the property so attached was replevied by giving bond for the value of such property, estimated at the sum of One Hundred and Four Thousand, Nine Hundred Dollars, (\$104,900.00), it is therefore, further

182 Ordered, adjudged and decreed that said plaintiffs do have and recover of and from the Pacific Surety Company, a corporation, the surety named in the bond given to replevy said attached property, the sum of One Hundred and Four Thousand, Nine Hundred Dollars (\$104,900.00), with interest thereon at the rate of six per cent per annum since the 18th day of May, 1908, the date of said bond, and that plaintiffs have execution therefor.

Dated as of the 24 day of December, 1908.

EDWARD KENT, *Judge.*

(Title Court and Cause.)

Amended Motion for New Trial.

Now come the defendants in the above-entitled action and move the court to set aside the verdict and judgment in the above-entitled action, and grant the defendants a new trial; for the following reasons and upon the following grounds, to-wit:

1. The court erred in admitting evidence at the trial for the plaintiff.
2. The court erred in rejecting evidence for the defendants at the trial.
3. The court erred in charging the jury on questions of law.
4. The court erred in interpreting the contract itself without submitting to the jury the questions of fact arising from the evidence of extrinsic facts and circumstances introduced in evidence.
- 183 5. The evidence is insufficient to sustain either the verdict or the judgment.
6. The verdict and judgment are against the evidence.
7. The verdict and judgment are against the law.
8. The court erred in denying the defendants' motion that the jury be instructed to return a verdict for the defendants.
9. The damages assessed are excessive and unwarranted by the evidence.
10. The Court erred in the interpretation of the contract.

BEN GOODRICH,
A. C. BAKER,
CHARLES BOWMAN,
Attorneys for Defendants.

(Title Court and Cause.)

Stipulation.

It is hereby stipulated that the plaintiffs will, on demand of the defendants made in writing, on or before the 15th day of June, 1909, satisfy the judgment heretofore entered herein of record, upon receipt from the defendants on or before said time of instruments in writing assuring to the plaintiffs a four-sevenths interest in the property owned by the Turquoise Mining and Smelting Company on the first day of February, 1905, all of said property being subject to an indebtedness of Thirty-nine thousand dollars (\$39,000.)

Dated May 7, 1909.

EUG. S. IVES,
GEO. H. NEALE,
Attorneys for Plaintiffs.

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(Title Court and Cause.)

I, the undersigned Clerk of the District Court of the Third Judicial District of Arizona Territory, in and for Maricopa County, do hereby

certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book I of said Court, at pages 197-8. And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand, and seal of the District Court, this 20th day of January A. D. 1909.

ELIAS F. DUNLEVY, *Clerk.*

185 And on the same day, to-wit, on the 5th day of August, 1909, the appellants, by their attorneys, filed in the Clerk's office of said Court, in the above entitled cause, the following papers not included in the judgment roll, in the words following, to-wit:

(Title Court and Cause.)

Motion.

Comes now the defendants W. S. Tevis and W. H. McKittrick by their attorneys, and move the Court for an order requiring the plaintiffs in the above entitled action to give security for the costs in this action. This motion is based upon the affidavit of Charles Bowman, one of the attorneys for the defendants, copy of which is hereto attached.

CHARLES BOWMAN,
BEN GOODRICH,

Attorneys for Defendants W. S. Tevis and W. H. McKittrick.

(Title Court and Cause.)

Affidavit.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Charles Bowman, one of the attorneys for the defendants W. S. Tevis and W. H. McKittrick, in this action, being first duly sworn, deposes and says: That the plaintiffs Jepp Ryan, T. C. Ryan and E. B. Ryan, are each and all nonresidents of the Territory of Arizona.

CHARLES BOWMAN.

Subscribed and sworn to before me this 7th day of December, 1907.

[SEAL.]

E. G. SHEPARD,
Notary Public in and for Cochise County, Arizona.

My commission expires February 20th, 1911.

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(Title Court and Cause.)

Affidavit.

TERRITORY OF ARIZONA,

County of Cochise, ss:

Charles Bowman, one of the attorneys for the defendants W. S. Tevis and W. H. McKittrick, in this action, being first duly sworn, deposes and says: That the plaintiffs Jepp Ryan, T. C. Ryan and E. B. Ryan, are each and all non-residents of the Territory of Arizona.

CHARLES BOWMAN.

Subscribed and sworn to before me this 7th day of December, 1907.

[SEAL.]

E. G. SHEPARD,

Notary Public in and for Cochise County, Arizona.

My commission expires February 20th, 1911.

(Title Court and Cause.)

Stipulation.

It is hereby stipulated that the Clerk of the District Court of Cochise County may, within five days after June 8th, 1908, issue a commission to any officer authorized by the laws of the Territory of Arizona to take depositions, resident of Omaha, Nebraska, to take the answers of Thomas B. McPherson, a witness for defendants, to the direct interrogatories and such cross-interrogatories as counsel for plaintiff may prepare. Filing and service of notice is hereby waived, and all other objections to the interrogatories or their answers are hereby waived except for incompetency, immateriality and irrelevancy. It is further stipulated that each party may use the depositions so taken on the trial of said action with the same force and effect as though said witness was present and giving his testimony.

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JAMES REILLY,

Attorney for Plaintiffs.

CHARS. BOWMAN,

BEN GOODRICH,

*Attorneys for Defendants.**(Deposition of Thomas B. McPherson.)*

1. Please state your name, age, residence and business?

A. Thomas B. McPherson, age fifty-five, Omaha, Nebraska, live stock business.

2. State whether or not you know and did know in 1902, and after that date, Jepp Ryan, and if so, how long have you known him?

A. I knew Jepp Ryan in 1902, met him first in 1901, and have known him from that time to date.

3. State whether or not you had any business transaction with Jepp Ryan and if so give the nature and character of such business transaction?

A. In the month of July, 1902, Jepp Ryan applied to me for a loan for the purpose, as he explained, of purchasing at Sheriff's sale certain mining properties located near Gleeson, Arizona.

4. If in answer to the last interrogatory you state that Jepp Ryan borrowed or tried to borrow a sum of money from you in 1902, state for what purpose he desired to borrow said money, and give the conversation in full as near as you can remember it?

A. In applying for the loan mentioned in my former answer, Jepp Ryan stated that a Mr. Tevis and a Mr. McKittrick
188 were part owners of the properties and that he, Ryan, already had invested Ninety Thousand Dollars (\$90,000) in them, which would be a total loss to him unless he could raise the money to purchase at Sheriff's sale. He said the properties were very valuable and that his investments would be a total loss unless he could raise this money and that by this process if he could secure the money he could become sole owner of the mines, thus shutting out his partners with whom he had had some disagreement. He represented that I would be amply secured in making this loan as the title to the entire property, which had cost something over One Hundred and Eighty Thousand Dollars (\$180,000) would be lodged in me, and under the laws of Arizona no one could redeem except him. As an inducement for me to advance this money he proposed and agreed that when the time for redemption should have passed he would organize a new Company and by a sale of Its stock would pay me the money invested, and whatever profit there was over and above the original investment he would divide with me, share and share alike. I finally agreed on this basis to furnish the money provided he would go to Gleeson, attend the sale and see that the investment was safe. On July 31st, 1902, he made a draft on me in favor of A. V. Lewis, Sheriff of Cochise County, for Twenty-three Thousand Six Hundred Forty-one and 29/100 Dollars (\$23,641.29) and in due course I received from said Sheriff a Bill of Sale dated August 26th, 1902, covering the properties in question.

5. If in answer to any of the foregoing interrogatories
189 you say that Jepp Ryan desired to borrow money from you for the purpose of purchasing copper property or mines situated near Gleeson, in the County of Cochise, Territory of Arizona, which were to be sold at Sheriff's sale, please state what said Ryan stated to you as to the ownership of said property, and what amount of money he had invested in the same; and, if he mentioned any co-owners or part owners of said property, please give their names?

A. As previously stated, Ryan said that Tevis and McKittrick owned a half interest in the properties referred to with him, and that they had an investment of Ninety Thousand Dollars (\$90,000) which was the amount he personally had put into the deal.

6. Please state if Mr. Ryan in any conversation with you on

the subject mentioned the name of his partners, and what his purpose was with reference to getting rid of them and obtaining the sole ownership of the mining property in Arizona, if such conversation was had?

A. Mr. Ryan said that by purchasing the property at Sheriff's sale he would shut out his partners, Tevis and McKittrick, and he and I would become sole owners of the property.

7. What inducement, if any, did he hold out to you to purchase said mines at Sheriff's sale?

A. He said that the properties could be purchased at Sheriff's Sale at a cost not to exceed Twenty-five Thousand Dollars (\$25,000) and that when the time to redeem was passed he would organize a corporation and sell a sufficient amount of stock therein to re-pay me the money invested, and that if I would advance this money he would divide the balance of the stock with me, share and share alike.

8. Please state in whom the title was to be lodged, and what was done with reference to the title to the property after the time for redemption should have passed?

A. The title was to be lodged in me until such time as the Corporation above mentioned could be organized and stock sold to reimburse me.

9. If anything was said about the organization of a new corporation or company and of sale of stock in the proposed new corporation or company, what profit or interest were you to derive from such transaction, and what was to be the share of said Ryan in the profit of such transaction, and what interest was he to have in the stock of the new corporation?

A. The corporation, or Company, referred to above, when organized, was to take over the property, paying me the amount of my investment in full, and Ryan was to divide the balance of the stock of this Company with me, share and share alike.

10. State whether or not you advanced or loaned to Ryan the necessary money, or any money, to enable him to purchase said mining claims at Sheriff's sale, and give the date of the sale, if you remember it, and how much money you furnished to Ryan, if any?

A. On the strength of the agreement to which I have testified between Jepp Ryan and myself, I paid his draft on me dated July 31st, 1902, for Twenty-three Thousand Six Hundred Forty-one and 29/100 Dollars (\$23,641.29) and received a Bill of Sale from the Sheriff of Cochise County covering the properties sold under date of July 26th, 1902.

11. What other transactions in relation to said mines did you have with said Ryan? Please be full and explicit and state all that you can remember about the transaction,—how much money you furnished him, when you furnished it, how you furnished it, at what different times you furnished him money for the purpose of purchasing said property at Sheriff's sale, and the total amount you loaned him?

A. In addition to the price of the mine, to which I have testified above, Jepp Ryan made a draft on me from Gleeson, Arizona, dated

August first, 1902, in favor of P. B. Soto, Treasurer, for Fifteen Hundred Dollars (\$1500), explaining that this money was needed to pay the cost of an Engineer as he was forced to keep pumps going day and night in order to protect the property and keep it free from water. This draft I paid on August 8th. Later on, namely on November 29th, 1902, Jepp Ryan made a draft on me from Willcox, Arizona, for Thirteen hundred Fifty-three and 40/100 Dollars (\$1353.40) in favor of P. B. Soto, Treasurer, explaining that this was money he had paid out for labor and other expenses in protecting the properties which I had bought at Sheriff's sale. On November 11th, 1903, I received a draft from the Sheriff of Cochise County for Twenty-four Thousand Five Hundred Twenty-five and 50/100 Dollars, (\$24,525.50) which represented the amount I originally paid him, namely Twenty-three Thousand Six Hundred Forty-one and 29/100 Dollars (\$23,641.29) and interest thereon at 8 192 per cent. Ryan explained this part of the transaction as follows: Said he had made a new deal with his former partners, Tevis and McKittrick and with them was organizing the corporation to which I have previously referred in this deposition that they were to receive a little more than one-half of the capital stock of the new corporation and he and I were to receive the rest. No part of this stock was ever turned over to me, and none of the expense money furnished by me on his drafts in favor of J. B. Soto, Treasurer, has ever been re-paid me.

THOMAS B. McPHERSON.

(The foregoing deposition was taken before E. M. Reynolds, a Notary Public, in and for Douglass County, state of Nebraska, at Omaha, Nebraska, on the 23rd day of June, A. D., 1908.)

I, J. F. Cleaveland, Secretary to the Governor of Arizona, do hereby certify that the following is a true and correct copy of the second section of the Articles of Incorporation of the Pacific Surety Company as the said Articles now appear on file in the office of the Governor at Phoenix, Arizona, said section pertaining to the purposes for which the said Pacific Surety Company has been formed, to-wit:

"Second, That the purposes for which it is formed, are the insuring the fidelity of public or private employes, and all persons holding positions of public or private trust; furnishing bonds or undertakings on behalf of parties to civil actions, security in all matters of trust, and generally all such bonds as may be required by law, and such security in the nature of bonds of suretyship or of guarantee as may be required or desired; insuring against accidents to persons or property; acting as agent for other Companies of a like character; and doing all matters necessary and proper to the successful execution of these purposes."

JOHN F. CLEAVELAND,

Secretary to the Governor of Arizona.

Dated at Phoenix, Arizona, June 4th, 1908.

TUCSON, ARIZONA, *Mar.* 28/08.

Geo. B. Wilcox, Esq., Clerk, District Court, Tombstone, Arizona:

DEAR SIR: Heretofore and on or about the 25th day of November, 1907, I filed as attorney for Tevis and McKittrick in the case of Ryan et al., v. Western Company, et al., special appearance for the purpose of objection to the jurisdiction of the court.

The same was filed by me at the request of H. L. Packard, attorney-at-law residing at Bakersfield, California.

I have since been advised that the said Packard had no authority from the said Tevis and McKittrick to employ me as attorney for them; and that I, therefore, appeared for the said Tevis and McKittrick without their authority so to do.

I herewith withdraw such special appearance, and move that the same so signed by me be stricken from the records.

Yours truly,

EUG. S. IVES.

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TUCSON, ARIZONA, *Mar.* 28/08.

In re RYAN

VS.

WESTERN Co. et al.

Geo. B. Wilcox, Esq., Clerk, District Court, Tombstone, Arizona:

DEAR SIR: Heretofore and on or about the 25th day of November, 1907, I filed as attorney for the Western Company, a corporation, a general demurrer.

The same was filed by me at the request of H. L. Packard, attorney-at-law residing at Bakersfield, California.

I have since been advised that the said Packard had no authority from the said company to employ me as attorney for the said company; and that I, therefore, appeared for the said company without its authority so to do.

I herewith withdraw my said appearance, and move that the said demurrer so signed by me be stricken from the records.

Yours truly,

S. L. PATTEE.

TUCSON, ARIZONA, *April* 3/08.

RYAN V. WESTERN COMPANY.

Clerk District Ct., Cochise Co., Tombstone, Arizona.

DEAR SIR: Supplementing the request made in the above entitled matter a few days ago, I ask that the name of H. L. Packard be also stricken from the records of the court as attorney for the Western Company.

I signed the name of H. L. Packard to the general demurrer in pursuance of authority from him; but have since been advised that his telegram of authority to me was misunderstood.

Yours truly,

S. L. PATTEE.

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(Title Court and Cause.)

To Chas. M. Renaud, John Gleeson and B. A. Taylor, Greeting:

You are hereby commanded, laying aside all business, to appear before the District Court of the Second Judicial District at the Court House, in the City of Tombstone, on the 14th day of July A. D. 1898, at 2 o'clock, p. m. there to give evidence in a case pending between Jepp Ryan, et al. plaintiff against Western Company et al., as Defendant on behalf of —.

Of this fail not under penalty of the Law.

Witness Hon. Fletcher M. Doan, Associate Justice, Presiding in the Second Judicial District at Tombstone, this 9th Day of July, A. D. 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk*.

By PHILO WILCOX, *Deputy Clerk*.

(*Telegram.*)

Dated BAKERSFIELD, CAL., 1/4, 1907.

To Clerk Dis't Court, Tombstone:

I understand Demurrer has been filed for Western Company in case of Ryan against Same. Also that demurrer will not be heard until next term of court in April. Please answer if this is correct. And if on the record the Western Appearance is safe.

P. S. PACKARD.

JAN. 4", 1908.

To P. S. Packard, Esq., Bakersfield, Cal.:

Appearance Western Co. safe, hearing may be had in April.

GEO. B. WILCOX, *Clerk*.

Court consulted in matter of this date, P. M.

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(Title Court and Cause.)

To the Sheriff of Cochise County, Territory of Arizona:

Take Notice, That the plaintiffs above named object to the replevy bond, Filed with you in the above entitled Suit, and Do not accept the same, for the reason That the names of plaintiffs are Not correctly stated in said Bond, and It does not, appear That The Surety company, That executed said Bond, is authorized by its Articles of incorporation or charter, to execute such Bond.

JAMES REILLY,

Attorney for Plaintiffs.

I, A. P. Redding, Secretary of the Pacific Surety Company, of San Francisco, California, do hereby certify the following attached documents to be full, true and correct copies of the appointment of W. M.

Fickas, as General Agent of the Pacific Surety Company, in and for the Territory of Arizona.

In witness whereof, I have hereunto set my hand, and affixed the corporate seal of said Pacific Surety Company, at the City and County of San Francisco, State of California, this Eighteenth day of May, 1908.

[SEAL.]

A. P. REDDING, *Secretary*.

Appointment of General Agent for the Territory of Arizona.

Know all men by these presents: That the Pacific Surety Company, of San Francisco, State of California, does hereby constitute and appoint W. M. Fickas of the City of Phoenix, in the Territory of Arizona, its General Agent within and for the Territory of Arizona, with full power and authority:

197 1st. To appoint and remove all local agents for said Pacific Surety Company, within said Territory.

2nd. To receive all process and papers in suits against said Pacific Surety Company.

3rd. To attend to the payment of all fees due the Insurance Department of said Territory, and all taxes due the said Territory of Arizona.

Witness our hands and seal of said Pacific Surety Company, at its office in the City of San Francisco, California, this Eighteenth day of February A. D. 1904.

[SEAL.]

PACIFIC SURETY COMPANY,

By WALLACE EVERSON, *President*.

W. A. McLAUGHLIN,

Assistant Secretary.

I, W. A. McLaughlin, do hereby certify that I am the Assistant Secretary of the Pacific Surety Company, of California, a Corporation created under the laws of said State, and the Custodian of the Minutes and Records of said Corporation, and the Keeper of the seal thereof; that on the Fourteenth day of April, 1902, a regular meeting of the Directors was held at the office of said Corporation, in the City and County of San Francisco, in said State, upon notice duly and legally made; that a quorum was present at said meeting; that at said meeting, pursuant to a written assent of more than two-thirds of the Stockholders, there were adopted by unanimous vote of the Directors present, the following Amendments to the By-

Laws of the said Corporation, to wit:

198 Article X. Election and Appointment of Officers.

The President, three Vice-Presidents, Treasurer, Secretary and two Assistant Secretaries, shall be elected by the Board of Directors at their first meeting after the annual election of Directors. The President and Vice-Presidents shall hold their offices for one year, and until their successors are elected and qualified. The Treasurer and Secretaries shall hold their offices for one year, and until their successors are elected and qualified, unless sooner removed

by the Board of Directors. The Resident Assistant Secretaries shall be appointed by the president or Vice-President, subject to removal by either of the last named Officers. As amended April 14th, 1902.

Article XIV. The President or Vice-President shall have power to appoint such other officers, attorneys in fact, agents to accept service, general business agents and factors as may be deemed proper and requisite for the management of the interests and business of the Company. As amended April 14th, 1902.

Article XIX. Duties of Assistant and Resident Assistant Secretaries and other Officers and Employees.

Assistant Secretaries shall be invested with the powers and duties of the Secretary, in case of his absence, sickness or inability to perform the same.

Resident Assistant Secretaries shall have authority and power to execute and deliver and attach the seal of the Company to any and all bonds, on behalf of the Company, and the same shall
199 be valid obligations on the Company when countersigned by the Company's duly authorized Resident Agent.

Other Officers and Employees of the Corporation shall perform such duties as appertain to their respective positions, or as may be required by the Board of Directors or the President. As amended April 14th, 1902.

And I do certify that the foregoing is a full, true and correct copy of the said By-Laws, as amended and adopted at said meeting, and that the same is transcribed in the Book of By-Laws of said Corporation at pages 7, 9, 11, 14 and 15 thereof.

In witness whereof, I have hereunto affixed my signature, as the Assistant Secretary of said Corporation, and attached the seal of said Corporation thereto.

Done at the City and County of San Francisco, State of California, this 18th day of February, 1904.

[SEAL.]

W. A. McLAUGHLIN,

Assistant Secretary.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this Eighteenth day of February, 1904, before the subscriber, a Notary Public in and for the City and County of San Francisco, State of California, duly commissioned and qualified personally appeared Wallace Everson President, and W. A. McLaughlin, Assistant Secretary, of the Pacific Surety Company, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledged the
200 execution of the same, and being by me duly sworn, severally, and each for himself, deposes and says, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal, and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

In testimony whereof, I have hereunto set my hand and affixed

my official seal at the City of San Francisco, the day and year first above written.

[SEAL.]

O. A. EGGERS,
*Notary Public in and for the City and
County of San Francisco, State of California.*

Pacific Surety Company.

Home Office #326 Montgomery Street, San Francisco, California.

Quarterly Report.

MARCH 31ST, 1908.

Cash Capital	\$250,000.00
Surplus as to Policy Holders	371,674.55
Total Assets	448,996.71

Assets.

Loans on Mortgages	\$68,624.86
Deposits in Savings Banks	57,166.45
Bonds owned by Company, Market Value	240,905.00
Stocks owned by Company, Market Value	26,505.00
Interest due and accrued	6,191.55
Cash in Bank and Company's Office	31,412.28
Premiums in Course of Collection, less commission ...	15,334.11
Suspense Items	2,857.36
	<hr/>
	\$448,996.71

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Liabilities.

Capital Stock	\$250,000.00
Reserve for Losses in Process of Adjustment	20,420.00
Re-Insurance Reserve	56,333.42
Other Liabilities	568.74
Net Surplus	121,674.55
	<hr/>
	\$448,996.71

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Personally appeared before me, Wallace Everson, President, and A. P. Redding, Secretary, of the Pacific Surety Company, who, being by me duly sworn, deposes and says, that they are the above described Officers of said Company; and that the foregoing statement is a full, true and correct exhibit of the assets and liabilities of said Pacific Surety Company, for the quarter ending March 31st, 1908.

WALLACE EVERSON, *President.*
A. P. REDDING, *Secretary.*

Subscribed and sworn to before me, this 18th day of May, A. D. 1908.

[SEAL.]

O. A. EGGERS,
*Notary Public in and for the City and
County of San Francisco, State of California.*

(Telegram.)

TOMBSTONE, Az., Dec. 16, 1908.

Clerk District Court, Phoenix, Az.:

Issue and have served subpoena on pablo soto of Wilcox who is in Phoenix case Ryan versus Tevis and McKittrick for trial on twenty first.

J. T. KINGSBURY, *Att'y.*

202 You are instructed that if you find that the plaintiffs are entitled to damages under the evidence and instructions of the Court, in ascertaining the amount of such damages you shall ascertain the value of the property at the time that the plaintiffs demanded that the defendants reinvest them with their interest therein. You should deduct therefrom the amount of the claim of the Western Company with interest, to wit, \$39,000, and then award the plaintiffs 4/7 of the balance remaining.

Requested by plaintiff.

EUG. S. IVES,
Att'y for Pl'ffs.

Given.

E. KENT, *Judge.*

(Title Court and Cause.)

Memorandum of Costs and Disbursements.

Disbursements.

Sheriff's Fees	\$54.65
Clerk's Fees	34.65
Witness' Fees:	
Pablo Soto 3 days 25 miles.....	8.25
S. H. Bryant 3 days 25 "	8.25
John Gleeson 3 days 25 "	8.25
B. A. Taylor 2 days 25 "	6.75
Chas. Renaud 2 days 25 "	6.75
Jury fees	\$127.55
	\$108.00
Total.....	\$235.55
Additional Clerk on reformed judgment.....	2.65
	\$238.20

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E. S. IVES,
GEO. NEALE, &
J. T. KINGSBURY,
Attorneys for Plaintiffs.

TUCSON, ARIZONA, April 13/09.

Hon. A. C. Baker, Phoenix, Arizona.

MY DEAR JUDGE: Yours of Yesterday is at hand. I hope that it will be agreeable to Judge Kent and yourself to have the argument for rehearing set as near the 15th of May as possible. Of course, as suggested by you, the order will be entered by my request.

Yours truly,

EUG. S. IVES.

Know all men by these presents, that we, Jepp Ryan of First Holliwood, County of Los Angeles and State of California, and T. C. Ryan, of Leavenworth, Kansas, and E. B. Ryan of the County of Yellowstone and State of Montana. Named in the Instrument a copy of which is hereto annexed in consideration of the Sum of Five Thousand dollars (\$5,000.00.) to us in hand paid by John Gleeson of Cochise County Territory of Arizona, the Receipt whereof is hereby acknowledged, Do hereby Sell, Assign, Transfer and Set Over unto the said John Gleeson, his heirs and Assigns, The said Instrument and all our right Title and interest in and to the same, Authorizing him in our names or otherwise, but at his own cost, charge and expense to inforce the same according to The Tenor thereof, and to take all legal measures which may be proper or necessary for the complete inforcement of the said Contract according to its tenor, and for the complete recovery of the property mentioned and described therein and for damages for the failure of the

204 parties of the first part thereto to perform their part as set out in said Contract.

In witness whereof we have hereunto set our hands This — day of — A. D. 1908.

JEPP RYAN.
T. C. RYAN.
E. B. RYAN.

STATE OF CALIFORNIA,

County of Los Angeles:

On this day personally appeared before me A Notary Public, in and for the County aforesaid Jepp Ryan known to me to be the person of that name whose name is subscribed to the foregoing instrument, and acknowledged to me That he executed the same for the uses and purposes therein mentioned, and consideration Therein mentioned.

Given under my hand and seal of Office this 13th day of January 1908. My commission expires the 29 day of October 1910.

[SEAL.]

J. T. BUNN,
Notary Public.

STATE OF KANSAS,

County of Leavenworth:

On this day before me personally appeared T. C. Ryan known to me to be the same person who in such name subscribed the foregoing

instrument and acknowledged to me That he executed said Instrument for the purpose and consideration therein expressed.

Given under my hand and seal of Office this 20 day of January A. D. 1908.

My commission expires the 27 day of October, 1910.

[SEAL.]

RUBY BOYD,

Notary Public.

205 STATE OF MONTANA,
County of Yellowstone, ss:

Before me F. X. N. Rademaker, a Notary Public, personally appeared E. B. Ryan, on this 23 day of January, 1908, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

My commission expires Apr. 9-1909.

F. X. N. RADEMAKER,

Notary Public.

This agreement made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan and E. B. Ryan of Leavenworth, Kansas, parties of the second part,

Witnesseth: That, whereas the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona,

And whereas the parties of the first part now own and control three-sevenths of the capital stock of the said corporation and the parties of the second part four sevenths of the said capital stock thereof,

And whereas the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the
206 affairs of the said corporation,

Now, therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the Treasury of the said company to be sold in whole or in part by the said parties of the first part, at such price or prices as the Board of Directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows:

First. To pay off and liquidate a certain judgment held by T. B. McPherson of Omaha, Nebraska, or his assigns, against the said corporation in the amount of about \$25,532.47 dollars;

Second. To use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this company,

The parties of the second part hereby agree to and with the parties of the first part that the officers in the said corporation now repre-

senting the interest of the parties of the second part shall resign from said office or offices and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire; said second parties agree to give the parties of the first part as their interest in the said company a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of said company. That the

remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first

parties and 99,000 shares to the parties of the second part. Said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last mentioned shares as possible at not less than par value and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto until they have been fully reimbursed for the money they now have expended upon this property amounting to about 16,000, when the remaining shares shall be divided equally among them according to their respective interests in the ratio aforesaid.

It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company excepting the expense of selling the stock held in trust for the parties hereto.

The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract; should they fail or refuse to comply with the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure

of parties of the first part to do any and all things herein required of them, then the interests of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void, in respect to all parties hereto.

All erasures and changes and interlineations were made prior to the signing of this instrument.

Witness our hands the day and year first above mentioned.

WILLIAM S. TEVIS,

W. H. MCKITTRICK,

Parties of the First Part.

JEPP RYAN,

THOMAS C. RYAN,

E. B. RYAN,

Parties of the Second Part.

209 And on the same day, to-wit, the 5th day of August, 1909, came the appellant by their attorneys and filed in the clerk's office of said Court in said entitled cause certain plaintiffs' exhibits, in words and figures following, to-wit:

(PLAINTIFFS' EXHIBIT A.)

DECEMBER 8, 1902.

Bakersfield Club.

Ryan Bros., Leavenworth, Kansas.

DEAR SIR: I enclose with this our agreement signed by Tevis and me. Soto will have the amended articles of incorporation published and will send them to Jepp to sign. Send your resignations and your stock endorsed as soon as possible so we can reorganize and sell stock to meet the judgment due Feby. 1st. I hope luck will be with us and that we can pull out winners.

Yours truly,

W. H. McKITTRICK.

(PLAINTIFFS' EXHIBIT B.)

Resolution.

Annual meeting of the stockholders of the Turquoise Copper Mining and Smelting Company, held at the office of the Company in the Town of Willcox, Territory of Arizona, on the eighth day of October, 1902.

There being present at said meeting E. B. Ryan, and P. B. Soto and besides them, Jephtha D. Ryan, and Thos. C. Ryan, by E. B. Ryan, proxy, representing a majority of the capital stock of said company; and it appearing to be the desire of the stockholders of said company that the annual meeting and the election of a Board of Directors, be postponed until the 12th day of November, 1902, and that date fixed as the date upon which to hold the annual
210 meeting of the stockholders for the ensuing year, and the election of a Board of Directors.

There being no further business before the meeting, on motion the meeting was duly adjourned.

JEPP RYAN, *President.*

P. B. SOTO, *Secretary.*

Adjourned meeting of the stockholders of the Turquoise Copper Mining and Smelting Company, held at the office of the Company, in the Town of Willcox, Territory of Arizona, on the 12th day of November, 1902.

There being present at said meeting E. B. Ryan and P. B. Soto, and besides them, Jephtha D. Ryan and Thos. C. Ryan, by E. B.

Ryan, proxy, representing a majority of the capital stock of said Company; and it appearing to be the desire of the stockholders of said company, that the annual meeting and the election of a Board of Directors, be postponed until the 26th day of November, 1902. On motion duly made and carried, the annual meeting of the stockholders and the election of a Board of Directors, for the ensuing year, was postponed until the 26th day of November, 1902, and that date fixed as the date upon which to hold the annual meeting of the stockholders for the ensuing year and the election of a Board of Directors.

There being no further business before the meeting, on motion duly carried, the meeting was duly adjourned.

JEPP RYAN, *President*.

P. B. SOTO, *Sec'y*.

A stockholders' meeting of the Turquoise Copper Mining and Smelting Company, was held at the office of the Company, in Willcox, Cochise County, Arizona, on the 26th day of November, 1902.

211 There being present at said meeting Jepp Ryan, Thomas C. Ryan, E. B. Ryan, W. H. McKittrick and P. B. Soto, representing a majority of the Capital stock of said corporation.

President Jepp Ryan in the chair.

Moved and carried that all minutes of previous meetings be approved.

Election of Board of Directors.

Moved and carried that the same Board of Directors remain in office — for the preceding year.

Moved and carried to adjourn until the 29th day of November, 1902.

JEPP RYAN, *President*.

P. B. SOTO, *Sec'y & Treas.*

A stockholders' meeting of the Turquoise Copper Mining and Smelting Company was held at the office of the Company, in Willcox, Cochise County, Arizona, on the 29th day of November, 1902.

President Jepp Ryan in the chair.

On motion of W. H. McKittrick, seconded by T. C. Ryan, the Articles of incorporation of the Turquoise Copper Mining and Smelting Company were amended to read as follows:

Certificate of amendment of Articles of incorporation of the Turquoise Copper Mining and Smelting Company.

"This is to certify that at the meeting of the stockholders of the Turquoise Copper Mining and Smelting Company, held on the 29th day of November, at the Company's office in Willcox, Cochise County, Arizona, due notice thereof having been published, the following resolution was passed by an affirmative vote, representing a majority of all the corporation's capital stock:

212 "Resolved: that the Article 3 of the Articles of Incorporation of the Turquoise Copper Mining and Smelting Company be and is hereby amended to read as follows, to-wit:"

"The amount of the Capital Stock shall be One Million Dollars, (\$1,000,000.00) divided into One Million shares (1,000,000 shares) of the par value of one dollar (\$1.00) each, which capital stock shall be paid in upon the call of the Board of Directors of this corporation. And it shall be forever non-assessable.

And each certificate when issued shall state upon its face the number of shares represented thereby, and that the same is fully paid and forever non-assessable."

In witness whereof, we, the President and Secretary of the above corporation have hereunto set our hands this 29th day of November, 1902. There being no further business before the meeting, on motion duly carried, the meeting adjourned.

JEPPI RYAN, *President*.

P. B. SOTO, *Sec'y*.

Special Meeting of Stockholders.

A special meeting of the stockholders of the Turquoise Copper Mining and Smelting Company, a corporation was held at the rooms of the First National Bank of Bakersfield, at Bakersfield, California, on the 26th day of January, 1903, pursuant to the call and consent in writing of all the stockholders of said corporation.

The meeting was called to order by Vice-President W. H. McKittrick, who presided as Chairman of the meeting in the absence of the President of the corporation.

213 The Secretary of the corporation not being present, at the meeting, on motion of W. S. Tevis, seconded by Frank S. Rice and by the unanimous vote of all of the stockholders, P. W. Bennett was appointed Secretary of the meeting.

All of the stockholders and stock of the corporation were present at said meeting, either in person or by proxy, as follows, to wit:

W. S. Tevis, in person, representing 21,417 shares; W. H. McKittrick in person, representing 21,417 shares; W. R. Shafter in person representing 100 shares, being embraced in Certificate No. 32 issued to W. H. McKittrick and endorsed by him to W. R. Shafter; Frank S. Rice in person representing 78 shares, being embraced in Certificate No. 32, issued to W. H. McKittrick and endorsed by him to Frank S. Rice; Clinton E. Worden, in person, representing 100 shares, being embraced in certificate No. 32, issued to W. H. McKittrick and endorsed by him to Clinton W. Worden; P. B. Soto by W. H. McKittrick, proxy, representing 54 shares; Jeppi Ryan by W. H. McKittrick, proxy, representing 14,278 shares; T. C. Ryan by W. H. McKittrick, proxy, representing 28,278 shares; and E. B. Ryan by W. H. McKittrick, proxy, representing 14,278 shares; and making in the aggregate 100,000 shares, being all of the stock of the corporation.

The Vice President presented to the meeting and caused to be read by the Secretary, the resignation of Jeppi Ryan as President and Director of the Corporation and also the resignations of T. C. Ryan and E. B. Ryan as Directors of the corporation.

214 On motion of W. R. Shafter, seconded by W. S. Tevis and by a unanimous vote of all of the stockholders, all of the said resignations were accepted.

On motion of W. S. Tevis, seconded by Frank S. Rice, and by unanimous vote of all the stockholders, it was ordered that the stockholders proceed to elect three directors of the corporation, to fill the vacancies in the Board of Directors made by the resignations of T. C. Ryan, E. B. Ryan and Jepp Ryan, and that the Secretary of the meeting act as teller in taking the vote of the stockholders for such directors.

The vote of the stockholders for Director, as taken by the teller was as follows:

Each of the following named persons, to wit: W. R. Shafter, Frank S. Rice and Clinton E. Worden, received the following vote for Director, to-wit: W. S. Tevis, 21,417 shares; W. H. McKittrick, 21,417 shares; W. R. Shafter, 100 shares; Clinton E. Worden, 100 shares; Frank S. Rice, 78 shares; P. B. Soto, 54 shares; Jepp Ryan, 14,278 shares; E. B. Ryan, 14,278 shares; T. C. Ryan, 28,278 shares. Making in the aggregate 100,000 shares, being a unanimous vote of all of the stock of the corporation.

The vote of all the stockholders of the corporation for W. R. Shafter, Frank S. Rice and Clinton E. Worden, for Directors and of said corporation being unanimous, the Chairman declared and announced that said W. R. Shafter, Frank S. Rice and Clinton E. Worden were duly elected as Directors of said corporation to fill the vacancies in the Board of Directors made by the resignations of Jepp Ryan, T. C. Ryan and E. B. Ryan.

215 On motion of W. S. Tevis, seconded by Frank S. Rice and by a unanimous vote of all of the stockholders of the corporation, the by-laws of the corporation were amended by adding thereto the following as a by-law of said corporation to be designated Article 16, to-wit:

Regular meetings of the Board of Directors of this corporation shall be held at the office of the corporation in the Producers Savings Bank Building in the City of Bakersfield, Kern County, State of California on the first Monday of each month at the hour of 3 o'clock P. M., for the transaction of any of the business of the corporation and such meetings may be adjourned from time to time, as may be necessary to attend to the business of the corporation, and no notice of such meetings or adjourned meetings shall be necessary; and a quorum of the Board of Directors being present at any regular or adjourned meeting of the Board shall be competent to transact any business of the corporation; and all acts of the Board of Directors and all business transacted by the Board of Directors at such meetings where a quorum of the Directors are present shall be as valid and binding on said corporation and on all of the stockholders thereof, as though done by a full Board of Directors, at the principal place of business of the corporation at Willecox, Cochise County, Territory of Arizona.

There being no further business before the meeting, on motion duly passed, the meeting of stockholders was adjourned sine die.

W. H. MCKITTRICK,

Vice-President.

P. W. BENNETT, *Secretary.*

Directors' Meeting.

We, the undersigned, the Directors of the Turquoise Copper Mining and Smelting Company, a corporation, do hereby give our written consent to the holding of this special meeting of the Board of Directors of the said corporation, on this 26th day of January, 1903; (immediately after the close of the stockholders' meeting), at the rooms of the First National Bank of Bakersfield, in the City of Bakersfield, Kern County, California, for the purpose of organizing the Board of Directors of the corporation, and transacting any other business that may come before the Board.

Wm. R. Shafter, W. H. McKittrick, William S. Tevis, Frank S. Rice, Clinton E. Worden.

Pursuant to the foregoing consent and the written and telegraphic consent of Directors and Stockholders on file with the said corporation, a special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Company, a corporation was held on the 26th day of January, 1903, at the Directors' Room of the First National Bank of Bakersfield in the Producers Savings Bank Building, in the City of Bakersfield, Kern County, California, immediately upon the adjournment of the meeting of the stockholders of the corporation, at said place.

At which meeting all of the Directors of the said corporation were present.

W. H. McKittrick, presiding as Chairman at said meeting, the former president of said corporation, having resigned, and not being present at said meeting.

217 The Secretary of the corporation having resigned his office and not being present at the meeting; upon motion duly made and seconded and by a unanimous vote, P. W. Bennett was appointed Secretary pro-tem of the meeting.

The Secretary pro-tem read the minutes of the stockholders meeting held on said 26th day of January, 1903, whereby it appears that W. R. Shafter, Frank S. Rice and Clinton E. Worden were elected Directors to fill the vacancies in the Board made by the resignations of Jepp Ryan, T. C. Ryan and E. B. Ryan.

The said W. R. Shafter, Frank S. Rice and Clinton E. Worden took their seats with W. S. Tevis and W. H. McKittrick as the Board of Directors of the corporation.

The Vice President presented to the Board the resignation of P. B. Soto as Secretary and Treasurer of the corporation, which resignation was duly accepted by a vote of the Board.

W. H. McKittrick tendered his resignation of the office of Vice President of the corporation to take effect upon the election of a President of the corporation, which resignation was accepted to take effect upon the election of his successor.

W. H. McKittrick, the Vice President, announced the next business of the meeting to be, the election of the executive officers of the corporation.

On motion of W. S. Tevis, seconded by Frank S. Rice, and by the unanimous vote of the other Directors W. R. Shafter was elected

President of the corporation and immediately occupied the President's chair and presided at the meeting.

218 On motion of W. H. McKittrick, seconded by Frank S.

Rice and by the unanimous vote of the other directors, W. S. Tevis was elected Vice President of the corporation.

On motion of W. S. Tevis, seconded by Frank S. Rice, and by unanimous vote of the other directors, W. H. McKittrick was elected Secretary of the corporation and immediately entered upon the discharge of his duties as such and superseded P. W. Bennett as Secretary of the meeting.

On motion of W. S. Tevis seconded by Clinton E. Worden and by unanimous vote of the Board of Directors the First National Bank of Bakersfield was appointed Treasurer of the corporation.

On motion of W. S. Tevis, seconded by W. H. McKittrick and by a unanimous vote of the Board of Directors, the following resolution was passed and adopted, to wit:

Whereas, an agreement was made on the 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, the parties of the first part and Jepp Ryan, T. C. Ryan and E. B. Ryan, parties of the second part, a duplicate whereof is on file with the secretary of this corporation; whereby it is agreed that the parties of the first part are to have the control and management of the said corporation; and whereas the capital stock of the corporation has been changed from its original number of 100,000 shares of the par value of ten dollars each to 1,000,000 shares of the par value of one dollar each; and whereas by the terms of said agreement, all of the original stock and certificates thereof are to be surrendered to the corporation, and

the stock of said corporation is to be disposed of as follows, to-wit: 240,000 shares of the capital stock of the corporation is to be retained and placed in the treasury of the corporation, to be sold in whole or in part by the said W. S. Tevis and W. H. McKittrick at such prices as may be deemed advisable by the Board of Directors of said corporation for the purpose of raising money to pay the indebtedness of the corporation, and to pay for prospecting the mines of the corporation; and whereas it has been agreed that the parties of the first part shall have 280,500 shares of the capital stock of the corporation, and the parties of the second part shall have 279,500 shares of the capital stock of the corporation; and whereas it has been agreed between said parties that 200,000 shares of said capital stock shall be held by W. H. McKittrick as trustee for said parties of the first and second parts to said agreement, the said stock or the proceeds thereof to be divided between said parties, in the proportion of 101,000 shares to the parties of the first part and 99,000 shares to the parties of the second part, pursuant to the terms of said agreement, and whereas, W. S. Tevis and W. H. McKittrick, here present, direct that 100 shares of their portion of said capital stock be transferred and issued to each of the following persons, viz: W. R. Shafter, Frank S. Rice and Clinton E. Worden; and whereas, said W. S. Tevis and W. H. McKittrick, state that they are equal owners of all the stock held by them respectively in said corporation;

Now, therefore, it is resolved and ordered by the Board of Directors of said corporation, that upon the surrender to the said corporation of all the outstanding certificates of stock of said
220 corporation, 240,000 shares of the capital stock thereof shall be reserved in the treasury of said corporation; and that new certificates of stock, showing upon their face, that the capital stock of the corporation is 1,000,000 dollars, divided into 1,000,000 shares, of the par value of one dollar each, and showing that the said stock is fully paid and forever non-assessable, shall be issued as follows: 139,750 shares to T. C. Ryan; 69,875 shares to E. B. Ryan, 69,875 shares to Jepp Ryan; 100 shares to W. R. Shafter; 100 shares to Frank S. Rice; 100 shares to Clinton E. Worden; 140,100 shares to W. S. Tevis; 140,100 shares to W. H. McKittrick; and 200,000 shares to W. H. McKittrick, Trustee.

On motion of W. S. Tevis, seconded by W. H. McKittrick and by a unanimous vote of the Board of Directors, it was ordered that said W. S. Tevis and W. H. McKittrick may offer for sale and sell, at not less than twenty cents per share, the whole or any part of the 240,000 shares of the treasury stock of said corporation, and that upon payment therefor to the corporation, the President and Secretary shall issue to purchasers, certificates of stock for the shares of stock purchased by them, showing upon their face, that the capital stock of the corporation is 1,000,000 dollars, divided into 1,000,000 shares of the par value of one dollar each and the said stock is fully paid and forever non-assessable.

On motion of W. S. Tevis, seconded by *by* W. H. McKittrick and by a unanimous vote of the Board of Directors, it is ordered that the following by-law of the corporation, adopted at the stock-
221 holders' meeting of said corporation, held this day, be and the same is adopted as one of the by-laws of this corporation, to wit:

Regular meetings of the Board of Directors of this corporation shall be held at the office of the corporation, in the Producers Savings Bank Building, in the City of Bakersfield, Kern County, State of California, on the first Monday of each month, at 3 o'clock P. M. for the transaction of any of the business of the corporation, and such meetings may be adjourned from time to time, as may be necessary to attend to the business of the corporation, and no notice of such meetings or adjourned meetings shall be necessary, and a quorum of the board of directors present at any regular or adjourned meeting of the board shall be competent to transact any business of the corporation; and all acts of the board of directors and all business transacted by the board of directors, at such meetings, where a quorum of the directors are present, shall be as valid and binding on said corporation, and all of the stockholders thereof as though done by a full board of directors, at the principal office of the corporation, at Willcox, Cochise County, Territory of Arizona. And it was further ordered that the said by-law be designated Article 16; and that the said by-law and also the by-law adopted at the stockholders' meeting, held at the principal office of the corporation on October 21st, 1901, providing for the filling of vacancies in the board of

directors, which is hereby designated as Article 15; be entered in the book of by-laws and authenticated by the signatures of the directors of the corporation.

222 On motion of W. H. McKittrick, seconded by W. S. Tevis and by a unanimous vote of the board of directors, the principal office of the corporation in the State of California is fixed and established in the Producers Savings Bank Building in the City of Bakersfield, Kern County, California.

On motion of W. S. Tevis, seconded by Frank S. Rice and by a unanimous vote of the board of directors, it is ordered that the secretary procure for the use of the corporation a new book of certificates of stock, such certificates to be in the usual form and show upon their face, that the corporation is organized under the laws of the Territory of Arizona, with its principal office at Willcox, Cochise County, Arizona, and its principal office in California, at Bakersfield, Kern County, California, that its capital stock is 1,000,000 dollars, divided into 1,000,000 shares of the par value of one dollar each; and that the said stock is fully paid and forever non-assessable and that said stock is transferable only on the books of the corporation, by the holder thereof in person or by attorney, upon the surrender of the certificate properly endorsed.

On motion of Frank S. Rice, seconded by W. S. Tevis, P. B. Soto, a bona fide resident of the Territory of Arizona, who has been a bona fide resident of such Territory for at least three years, and now is a bona fide resident of Willcox, Cochise County, Arizona, was — vote of the board of directors appointed as the agent of this corporation in the Territory of Arizona upon whom all notices and processes, including service of summons on said corporation may be served.

223 On motion of Frank S. Rice, seconded by Clinton E. Worden, and by a unanimous vote of the board of directors, it is ordered that W. S. Tevis, the Vice-President and W. H. McKittrick, the Secretary of said corporation, or either of them be, and they are and each and either of them is hereby authorized and directed to redeem the mining claims and property of the corporation from a sale thereof made by the sheriff of Cochise County, Arizona, to one T. B. McPherson, the amount required to make such redemption being the sum of \$25,532.42, or thereabout; and for the purpose of making such redemption and raising money to pay the necessary expenses thereof and the other indebtedness and running expenses of the corporation, W. R. Shafter, President and W. H. McKittrick, Secretary, are hereby authorized to negotiate a loan to this corporation for a sum not exceeding thirty thousand dollars for such period of time and at such rate of interest as may be necessary to secure such loan, and they are hereby authorized and directed to execute on behalf of the corporation and under its seal, a promissory note to the person or corporation making such loan, for the payment of the sum so borrowed by them for this corporation, with interest as agreed upon by them and payable at the time agreed upon by them; and it is further ordered that the said promissory note, together with the interest thereon shall be paid out of

the first moneys arising from the sales of the 240,000 shares of the treasury stock of said corporation.

On motion of W. H. McKittrick, seconded by Frank S. Rice, and by a unanimous vote of the board of directors, the report
224 of P. B. Soto as Secretary and Treasurer of the corporation was approved and it was ordered that the balance of account of \$546.21 due to Soto Brothers as shown by said report from said corporation be paid to them as soon as funds are obtained by the corporation to pay the same.

On motion of Frank S. Rice, seconded by W. S. Tevis, and by a unanimous vote of the Board of Directors, W. H. McKittrick was appointed General Manager of this corporation.

There being no further business before the Board, on motion duly made and carried, the meeting was adjourned, sine die.

WM. R. SHAFTER, *President*.

W. H. MCKITTRICK, *Sec'y*.

JAN. 26, 1903.

Special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Co. Held in the rooms of the First Nat. Bank in the City of Bakersfield, November 30, 1903.

Vice President W. S. Tevis in the chair.

There were present besides him F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice, seconded by W. H. McKittrick, the reading of the minutes of the last meeting were dispensed with. W. H. McKittrick, the General Manager and Secretary of the company, then stated that the company had not paid the interest due on the company's note for \$30,000.00 given to W. S. Tevis Jan'y 26th, 1903, and that the indebtedness of the company to Soto Bros. and Renaud for wages paid and merchandise amounted to \$2,000.00.

On motion of F. S. Rice, seconded by W. H. McKittrick, it
225 was ordered that W. R. Shafter, President and W. H. McKittrick, Secretary, be authorized to negotiate a loan to this corporation from W. S. Tevis for an amount sufficient to pay the interest on said note to date and also for the amount of \$2,000.00 to pay Soto Bros. and Renaud and that the said interest on the note for \$30,000.00 and the \$2,000.00 due Soto Bros. & Renaud be paid at once.

There being no further business before the meeting, on motion duly seconded, meeting adjourned.

WM. R. SHAFTER, *President*.

W. H. MCKITTRICK, *Sec'y*.

Special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Co. held in the rooms of the First Nat. Bank in the City of Bakersfield, Feb'y 15th, 1904.

Vice-President W. S. Tevis in the chair.

There was present besides him, F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice seconded by W. H. McKittrick the reading of the minutes of last meeting was dispensed with.

Q. H. McKittrick, the General Manager and Secretary of the Company then stated that the indebtedness of the company to Soto Bros. & Renaud for wages paid and for Merchandise amounted to \$1,050.00 and that the bill of English & Bowman the company attorneys for \$200.00 had not been paid.

On motion of F. S. Rice, seconded by W. H. McKittrick, it was ordered that W. R. Shafter, President and W. H. McKittrick, Secretary, be authorized to negotiate a loan to this corporation from W. S. Tevis for \$1,250.00 and that the bill of Soto Bros. & Renaud for \$1,050.00 and the bill of English & Bowman for \$200.00
226 be paid at once.

There being no further business before the meeting, on motion duly seconded, meeting adjourned.

WM. R. SHAFTER, *President*.

W. H. MCKITTRICK, *Sec'y*.

Special meeting of the Directors of the Turquoise Copper Mining and Smelting Company, held in the rooms of the First National Bank in the City of Bakersfield, March 4th, 1904.

President W. R. Shafter in the chair. There being besides him W. S. Tevis, F. S. Rice and W. H. McKittrick, absent C. E. Worden.

On motion of W. S. Tevis, seconded by F. S. Rice, the reading of the minutes of the last meeting was dispensed with.

The following report was read by W. H. McKittrick, the Secretary and Manager. On January 26th, 1903, the Company borrowed from W. S. Tevis \$30,000.00 to redeem the mortgage note, amounting to about \$26,000.00.

On November 30, 1903 from W. S. Tevis \$2,533.35 to pay interest on the \$30,000.00 note to the Western Company.

On November 30th, 1903, from W. S. Tevis \$2,000.00 to pay Soto Bros. & Renaud for wages paid and store bill.

On February 15th, 1904, from W. S. Tevis \$1,250.00 to pay Soto Bros. & Renaud for wages paid and store bill amounting to \$1,050.00 and to English and Bowman \$200.00 retainer fee.

The company owe Rockfellow for surveying \$243.60, Horace Chase \$210.00 payment to Surveyor General, W. H. McKittrick \$181.25 expenses, Soto Bros. & Renaud \$350.00 for wages paid and store bill, making the total indebtedness about \$36,767.93.

227 In thirty days there will also have been paid about \$1,000.00 to secure patents and for current expenses.

On motion made by F. S. Rice, seconded by W. S. Tevis, the Secretary and manager's report was accepted and approved.

On motion of W. S. Tevis, seconded by F. S. Rice, all the official acts of the President, Treasurer, Secretary and Manager were approved and stand approved by the unanimous vote of all the directors present.

The secretary W. H. McKittrick reported that he had only been able to sell 32,000 shares of the company's stock at 25¢ per share and owing to the present condition of the company, and at the price asked for this stock, he could not sell any more.

The president, W. R. Shafter said the price of the stock was held too high and could not be sold.

The Vice President also said that it was out of the question to try and sell the stock at 25¢ per share.

The secretary, W. H. McKittrick, then said that all of the Company's notes given to W. S. Tevis had been assigned by said Tevis to the Western Company, and that the Western Company demanded immediate payment, and that the Company would have to have money at once to avoid foreclosure on the property.

On motion of W. S. Tevis, which was duly seconded, and unanimously carried, the following registered letter was sent to E. B. Ryan, T. C. Ryan and Jepp Ryan of Leavenworth, Kansas:

BAKERSFIELD, CAL., *March 14, 1904.*

DEAR SIR: Referring to my telegram to you of Feb'y 19th, 1904, which reads as follows: "Think I can sell all Turquoise Treasury Stock at 10¢ per share. Do you want it at that price? If not, and I get no reply shall feel at liberty to sell the stock by Monday next as we must raise money immediately. Answer." Will say that I have received no reply whatever from you although I have been informed that the telegram was delivered to you personally. This would indicate that you did not desire to accept our offer to let you have the stock at 10¢ per share. While awaiting your reply we have been able to get along without making sale until the present time but it has become necessary for us now to take action in the very near future, but we believe we can manage to get along until we know whether or not you wish to avail yourself of the opportunity to purchase at the figure named, if not, we will do the best we can in making sale of stock. Please give immediate reply as we are pressed for time. If you feel like offering less than the figure named, we shall be glad to have you do so. You will please understand that we have received no definite offer for this stock and while we are by no means certain that we can get 10¢ for it, we have thought that this price might find a purchaser. If you feel that you are prepared to give anything for it we would be glad to have you name a cash figure at which you will be willing to buy.

Yours truly,

W. H. MCKITTRICK,

Sec'y and Gen'l Manager T. C. M. & S. Co.

There being no further business before the board, on motion duly seconded, meeting adjourned.

WM. R. SHAFER, *President.*

W. H. MCKITTRICK, *Secretary.*

Special meeting of Board of Directors of the Turquoise Copper Mining and Smelting Co. held in the rooms of the First National Bank in Bakersfield, April 5th, 1904.

Vice President W. S. Tevis in the chair, There being present besides him F. S. Rice, W. H. McKittrick, C. E. Worden, absent W. R. Shafter.

On motion of C. E. Worden, seconded by F. S. Rice, the minutes of the last meeting of the Board of Directors were read and approved.

The Secretary then read the following letter from the Western Company:

BAKERSFIELD, CAL., April 5, 1904.

W. H. McKittrick, Secretary, Turquoise Copper Mining & Smelting Co., Bakersfield, Cal.

DEAR SIR: I have been instructed by the Board of Directors of the Western Company to notify you that this corporation holds by assignment from W. S. Tevis, the following notes from your corporation to him.

Note dated Jan'y 26th, 1903 for \$30,000.00 interest at the rate of 10% per annum, payable semi-annually. Interest paid to Nov. 30, 1903. Principal and balance of interest due to date.

Note dated Nov. 30, 1903, for \$2,533.33 interest at the rate of 10% per annum, payable semi-annually. Principal and interest both due from date of note.

Note dated Nov. 30, 1903 for \$2,000.00 interest at the rate of 10% per annum, payable semi-annually. Principal and interest both due from date of note.

Note dated Feb'y 15th 1904 for \$1,250.00 interest at the rate of 10% per annum payable quarterly. Principal and interest both due from date of note. I am also instructed to make demand upon your corporation for the payment of the principal and interest due on these notes within 45 days from this date. In default of which I have been instructed to enter suit for the collection of the same. Please give this matter your immediate attention and oblige.

Very truly yours,

(Signed)

THE WESTERN COMPANY,
J. C. SCHONENBACH, *Sec'y.*

On motion of F. S. Rice, seconded by C. E. Worden and by the unanimous vote of all of the Board of Directors present, it was ordered that W. H. McKittrick, Secretary of the Company, offer for sale and sell to the highest bidder, within the next thirty days all of the remaining stock in the treasury 208,000 shares, and that bids may be taken for all or any portion thereof. The highest bid in each case to prevail and that the money received from the said sale of stock to be used to pay off the indebtedness of the Company.

On motion of F. S. Rice, seconded by W. H. McKittrick and by the unanimous vote of all the Board of Directors present, it was ordered that a copy of the minutes of the special meeting of the Board of Directors held March 14, 1904, and that a copy of the minutes of this meeting be sent by registered mail to E. B. Ryan, H. Ryan and Jepp Ryan and that they be given the opportunity to make bids within thirty days for the remaining treasury stock of 208,000 shares or any part thereof. There being no further business before the Board, on motion duly seconded, meeting adjourned.

WM. R. SHAFTER, *President.*

W. H. MCKITTRICK, *Secretary.*

Special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Company held in the rooms of
231 the First National Bank of Bakersfield May 16th, 1904.

President W. R. Shafter in the chair. There being present besides him W. S. Tevis, F. S. Rice and W. H. McKittrick, absent C. E. Worden.

On motion of W. S. Tevis, seconded by F. S. Rice the reading of the minutes of the last meeting were dispensed with.

The Secretary W. H. McKittrick then made the following report:

As per instructions received from the Board at its meeting held April 5th, 1904, I sent by registered mail a copy of the minutes of said meeting to Jepp Ryan, Thomas Ryan and Eph Ryan and have received their signatures in acknowledgement of receipt of same but I have never received a bid from them for any part of the remaining treasury stock.

The following bids have been received by me:

BAKERSFIELD, May 3rd, 1904.

To the Secretary of the Turquoise Copper Mining and Smelting Co., Bakersfield, Cal.

MY DEAR SIR: I hereby offer you $\frac{1}{2}$ cent per share for all of the stock remaining in the treasury of your company, which I understand to be 208,000 shares. If my bid is accepted, you will please send the stock to Wells, Fargo & Co. Bank to be delivered to me upon payment of same.

Very truly yours,

L. O. KELLOGG.

BAKERSFIELD, CAL., May 3, 1904.

Mr. W. S. Tevis and Capt. W. H. McKittrick.

GENTLEMEN: Having seen the Turquoise Mining property in Arizona and having learned that you wish to sell a part of the stock thereof, I hereby make the offer of $\frac{3}{4}$ of a cent per share for 208,000 shares of the Turquoise Copper Mining and Smelting Co.

If my bid is accepted, please notify me at my office in Bakersfield and send said stock to the First National Bank to be delivered to me upon payment for same.

H. A. JASTRO.

On motion made by F. S. Rice, seconded by W. S. Tevis and by the unanimous vote of all of the Board of Directors present, it was ordered that the bid of $\frac{3}{4}$ of a cent per share for the 208,000 shares of treasury stock, made by H. A. Jastro, was the highest bid received and that said bid be accepted and that the President and Secretary be authorized to issue certificates of stock for 208,000 shares upon the payment of \$1,560.00 and that said \$1,560.00 be placed in the treasury of the company.

On motion made by W. H. McKittrick seconded by F. S. Rice, the President W. R. Shafter be instructed to meet the Directors of the Western Company and if possible have them defer their suit for payment of company notes.

There being no further business before the board on motion duly seconded meeting adjourned.

WM. R. SHAFTER, *President*.
W. H. MCKITTRICK, *Sec'y*.

Annual meeting of the stockholders of the Turquoise Copper Mining and Smelting Company held at Wilcox, A. T. Oct. 5th, 1904.

Due notice according to Article 4 Section 3 being published three times a week for two weeks in a daily newspaper in the city of Tombstone, A. T., known as the Tombstone Prospector.

Notice also given by registered mail to Jepp Ryan, E. B. Ryan and T. C. Ryan.

233 The other stockholders were also personally notified by W. H. McKittrick, Secretary of the Company.

Those present were:

W. H. McKittrick in person, representing	160,000 shares
J. M. Keith by proxy W. H. McKittrick	10,000 "
J. M. Quay "	2,000 "
H. A. Jastro "	208,000 "
W. S. Tevis "	146,100 "
F. S. Rice "	100 "
C. E. Worden "	J. B. Parks 100 "
W. R. Shafter "	P. B. Soto 100 "

Representing 520,500 shares, a majority of the capital stock of the company.

W. H. McKittrick was called to the chair and P. B. Soto was asked to act as temporary secretary.

On motion of J. B. Parks, proxy for C. E. Worden and seconded by P. B. Soto, proxy for W. R. Shafter, the minutes of the previous meeting were read and approved.

W. H. McKittrick, General Manager of the Company, then made a report of the company work from the 29th of November, 1902, to date.

W. H. McKittrick, Secretary of the Company made a full report of the finances of the Company since the 29th day of November, 1902, to date.

The National Bank of Bakersfield Treasurer of Company made no report.

On motion of J. B. Parks, proxy for C. E. Worden, seconded by P. B. Soto, proxy for W. R. Shafter, all of the official acts
234 of the President, Vice-President, Secretary, Treasurer, General Manager and the Board of Directors and all minutes of previous meetings were approved and stand approved by a vote of 520,500 shares of stock representing a majority of the capital stock of the Turquoise Copper Mining and Smelting Co. as follows:

W. H. McKittrick in person, representing	160,000	shares
J. M. Keith by proxy W. H. McKittrick	10,000	"
J. M. Quay " "	2,000	"
H. A. Jastro " "	208,000	"
W. S. Tevis " "	140,100	"
F. S. Rice " "	100	"
C. E. Worden " J. B. Parks	100	"
W. R. Shafter " "	100	"

Election of Directors of the Turquoise Copper Mining and Smelting Co.

On motion of J. B. Parks, proxy for C. E. Worden, seconded by P. B. Soto proxy for W. R. Shafter, W. S. Tevis, W. R. Shafter, C. E. Worden, F. S. Rice and W. H. McKittrick were elected directors of the Turquoise Copper Mining and Smelting Co., a majority of the vote of the capital stock of the company, as follows, to-wit:

W. H. McKittrick in person, representing	160,100	shares
J. M. Keith by proxy W. H. McKittrick representing	10,000	"
J. M. Quay " "	2,000	"
H. A. Jastro " "	208,000	"
W. S. Tevis " "	140,100	"
F. S. Rice " "	100	"
C. E. Worden " J. B. Parks	100	"
W. R. Shafter " P. B. Soto	100	"

235 W. H. McKittrick, one of the directors of the company then stated that the directors of the company had been notified by the Western Company that the outstanding notes of the Turquoise Copper Mining & Smelting Co. due the Western Company must be paid at once and that they would not take promises of payment any longer.

That some action must be taken at once to settle the account with the Western Company or that they would sue and get judgment and our property will be sold by the sheriff to the highest bidder.

On motion of J. B. Parks proxy for C. E. Worden, seconded by P. B. Soto, proxy for W. R. Shafter, it was ordered that the board of directors be authorized to immediately try and negotiate a new loan from someone else.

Motion carried by a majority of the capital stock voted.

There being no further business before the meeting, on motion made and duly seconded, the meeting adjourned.

WM. R. SHAFTER, *President.*

W. H. McKITTRICK, *In the Chair.*

W. H. McKITTRICK, *Secretary.*

P. B. SOTO, *Temporary Secretary.*

W. H. McKittrick, in the chair.

W. H. McKITTRICK, *Secretary.*

P. B. SOTO, *Temporary Secretary.*

WM. R. SHAFTER, *President.*

Special meeting of the Board of Directors of the Turquoise Copper Mining & Smelting Co. held in the rooms of the First National Bank in Bakersfield, Cal. November 6th, 1904.

The meeting was called to order by W. Tevis.

There were present besides him F. S. Rice and W. H. McKittrick.

Thereupon, on motion of F. S. Rice, seconded by W. H. McKittrick, W. R. Shafter was elected President of the Turquoise Copper Mining and Smelting Co. and of this Board.

On motion of F. S. Rice, seconded by W. H. McKittrick, W. S. Tevis was elected Vice President of the Turquoise Copper Mining and Smelting Co. and of this Board.

On motion of F. S. Rice, seconded by W. H. McKittrick, W. H. McKittrick was elected Secretary of the Turquoise Copper Mining and Smelting Co. and of this Board.

On motion of F. S. Rice, seconded by W. H. McKittrick, the First National Bank of Bakersfield was elected treasurer of the Turquoise Copper Mining and Smelting Company.

On motion of F. S. Rice seconded by W. H. McKittrick, W. H. McKittrick was elected General Manager of the Turquoise Copper Mining and Smelting Co.

Whereupon the Vice-President W. S. Tevis assumed the chair.

The secretary then read the minutes of the previous meeting of the board of directors, which on motion duly seconded and approved.

The minutes of the meeting held by stockholders at their annual meeting held at Willcox, A. T. Oct. 5th, 1904 were read and

On motion made by F. S. Rice, seconded by W. H. McKittrick, W. R. Shafter and W. H. McKittrick, were ordered to try and negotiate the new loan.

There being no further business before the board, motion made and duly seconded to adjourn.

WM. R. SHAFTER, *President.*

W. H. MCKITTRICK, *Secretary.*

Special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Co. held in the rooms of the First National Bank of Bakersfield, Dec. 12th, 1904.

The meeting was called to order by the President W. R. Shafter.

There were present besides him F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice seconded by W. H. McKittrick the minutes of the last meeting were read and approved.

W. H. McKittrick then said that so far, W. R. Shafter and himself had not been able to negotiate the new loan for the company.

W. H. McKittrick reported that there were only a few dollars left in the treasury and that the following bills ought to be paid at once.

To U. S. Land Office \$430.00 for patents for Tip Top, West Side, Santiago, Ann, San Juan and Maxon.

To Soto Bros. and Renaud's bill to Dec. 1st, 1904 for supplies and money advanced to pay wages at mine \$593.12.

To Bowman & Pickett Company lawyers for year 1904 \$200.

To W. H. McKittrick who paid the following bill for the company. Recorder Tombstone \$37.50 N. S. Recorder, Tucson \$30.00 Lawyer, Tucson for Monahan papers \$11.00. Tombstone Prospector \$5.00.

To W. H. McKittrick, traveling expenses from Bakersfield to mine August 10th and Oct. 4th and expenses going to Tucson, Benson and Tombstone as per bill rendered \$233.40.

To W. H. McKittrick for half interest in Monahan and Casey claim Tip Top No. 2 paid to Monahan by McKittrick and deed given to company \$250.00.

On motion made by F. S. Rice, seconded by W. H. McKittrick, the above bills were ordered paid as soon as there was any money in the treasury.

W. H. McKittrick manager of the company then said that for the best interest of the company, they should purchase from O'Brien, all of the Gladys claim and 1/- interest in the Copper Bell, Orange, Kohinoor, International and Cent. That these claims were only a short distance from the company property and might at some time be very valuable as they were along the same dyke. That O'Brien would sell his interest for \$800.00 and at that price he urged the company to buy them.

On motion of F. S. Rice, seconded by W. H. McKittrick, it was ordered that W. H. McKittrick buy the O'Brien interests for \$800.00 and to give the company check for that amount as soon as the money was in the Treasury.

W. H. McKittrick said that to pay all of the above accounts, it would take \$2,590.00 and that to pay this year's taxes, assessment work and small accounts that would come in before the end of the year, it would probably take \$400.00 more.

On motion made by F. S. Rice, seconded by W. H. McKittrick, it was ordered that W. R. Shafter, President and W. H. McKittrick be authorized to negotiate a loan to this corporation for \$3,000.00 and that the money be used to pay the above accounts, to purchase the O'Brien claims and to pay taxes, assessment work and small accounts.

WM. R. SHAFTER, *President*.
W. H. MCKITTRICK, *Sec'y*.

Special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Co. held in the rooms of the First
239 National Bank in Bakersfield, Cal., January 12th, 1905.

The meeting was called to order by the Vice President W. S. Tevis. There was present besides him F. S. Rice and W. H. McKittrick. On motion of F. S. Rice, seconded by W. H. McKittrick, the minutes of last meeting were read and approved.

The Secretary then reported that in compliance with the resolution passed at the special meeting of the Board of Directors held Dec. 12th, 1905, the President W. R. Shafter and Secretary W. H. McKittrick had given the Company note for \$3,000.00. That the secretary had not been able to secure the loan in Bakersfield, but

had secured the same from the Citizens National Bank of Los Angeles, Cal. by giving his personal endorsement on the note. That said note was due tomorrow Jan'y 13th, 1905, and that action would have to be taken immediately to relieve him of the responsibility of meeting the payment personally.

On motion of W. H. McKittrick seconded by F. S. Rice, the following resolution was passed by the Board of Directors.

That the President W. R. Shafter and the Secretary W. H. McKittrick be authorized to issue a new note for the Turquoise Copper Mining & Smelting Co. for \$3,000.00 and to make the payments to the Citizens National Bank of Los Angeles on the note for \$3,000.00 and interest due on same for \$20.00.

On motion made by W. H. McKittrick seconded by F. S. Rice, the following resolution was passed by the Board of Directors.

That the secretary W. H. McKittrick be authorized to try and secure the loan of \$3,020.00 from the Western Company by giving the Turquoise Copper Mining and Smelting Co's note for 240 \$3,020.00 for sixty days at ten % interest per annum payable quarterly and that the secretary be authorized to issue the following letter to the Western Company.

Office of the Turquoise Copper Mining & Smelting Co.

BAKERSFIELD, Jan'y 12th, 1905.

To the Secretary of the Western Company, Bakersfield, Cal.

DEAR SIR: In order to enable the Turquoise Copper Mining & Smelting Co. to meet its present obligations, which are imperative, the raising of the sum of \$3,020.00 is necessary and I am authorized by the Board of Directors of the Company, of which I am secretary, to request from the Western Company, a loan of this amount.

The President and Secretary of the Turquoise Copper Mining & Smelting Co. are authorized to execute the corporate note for this amount, at 10% per annum, interest payable quarterly.

I am authorized on the part of the Board of Directors of the Turquoise Copper Mining & Smelting Co. to say that this request is made with the additional statement to you, as security of the Western Company, that if this loan is made, the Turquoise Copper Mining & Smelting Co. will take immediate steps to secure to the Western Company the payment of all the notes, including the note now referred to, together with the interest on the same, within sixty days from date.

TURQUOISE COPPER MINING &
SMELTING CO.

W. H. MCKITTRICK, *Secretary*.

There being no further business before the Board of Directors on motion made and duly seconded meeting adjourned.

WM. R. SHAFTER, *President*.

W. H. MCKITTRICK, *Secretary*.

- 241 Special meeting of the board of directors of the Turquoise Copper Mining & Smelting Co. held in the rooms of the First Nat. Bank in Bakersfield, Cal., April 11th, 1905.

Meeting called to order by vice president W. S. Tevis.

There was present beside him F. S. Rice and W. H. McKittrick. On motion of F. S. Rice seconded by W. H. McKittrick, the reading of the minutes of the last meeting were dispensed with.

The secretary then read the following letter from the Western Company:

BAKERSFIELD, CAL., April 5th, 1905.

W. H. McKittrick, Secretary Turquoise C. M. & S. Co.

DEAR SIR: Your Company owes this corporation, the several amounts represented by the following notes:

Note dated Jan. 26th, 1903	.....	\$30,000.00
" " Nov. 30th "	.....	2,533.33
" " " " "	.....	2,000.00
" " Feb'y 15th, 1904	.....	1,250.00
" " Jan. 12th, 1905	.....	3,020.00
		<hr/>
		38,803.33

Interest at 10% per annum is also due on all of these notes from the date of execution, except on the \$30,000.00 note which interest is due from Nov. 30, 1903.

In this connection will say that this indebtedness having been taken under consideration by the board of directors of this company, I am instructed to say to you that if your company should not be able within twenty days from this date, to make arrangements for payment, of these notes that will prove satisfactory to our board, suit will be instituted to make collection of the principal and interest on all the notes.

Very truly yours,

THE WESTERN COMPANY,
By J. L. SHONENBACH, Sec'y.

- 242 On motion of F. S. Rice seconded by W. H. McKittrick, Secretary W. H. McKittrick was instructed to write and see personally as many of the stockholders as possible and find out how many of them would pay a voluntary assessment on this stock of five cents (5¢) per share so that this company could pay off all of its indebtedness to the Western Company and be free from debt and have a few thousand dollars in the treasury.

The secretary then said that he had already spoken to the following stockholders W. R. Shafter, W. S. Tevis, C. E. Worden, F. S. Rice, J. M. Keith, J. M. Quay, H. A. Jastro and W. H. McKittrick and that they were willing to pay the assessment. That he also expects to meet Jepp Ryan in a few days and that said Ryan represented his brothers T. C. Ryan and E. B. Ryan the other stockholders of the company.

W. H. McKittrick then stated that he had paid personally Soto Bros. & Renaud's bill for wages paid and supplies amounting to \$375.00 and other bills and expenses amounting to \$144.02 and that he could not well afford to be out this money for any length of time.

On motion made by F. S. Rice, seconded by W. H. McKittrick, it was moved that W. R. Shafter, President and W. H. McKittrick secretary be authorized to negotiate a loan to this corporation for \$500.00 and that said \$500.00 be paid to W. H. McKittrick as a part payment on the \$375.00 and \$184.00 paid by him for the company.

There being no further business before the board of directors, on motion made and duly seconded, meeting adjourned.

WM. R. SHAFTER, *President*.
W. H. MCKITTRICK, *Secretary*.

243 Special meeting of the board of directors of the Turquoise Copper Mining and Smelting Co. held in the rooms of the First National Bank at Bakersfield, Cal. Aug. 21st, 1905.

Meeting called to order by Vice-President W. S. Tevis. There was present beside him F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice, the minutes of the special meeting of January 12, 1905, and of the special meeting of April 15th, 1905, were read and approved.

The secretary then read the following letter:

JUNE 12th, 1905

To the Board of Directors of the Turquoise C. M. & S. Co.

GENTLEMEN: On the 26th day of January 1903, I was made General Manager and Secretary of your Company and I accepted with the understanding that I should be paid a salary for my services. You have all told me that you would willingly give me a salary of \$250.00 per month if the money were in the treasury and for me to wait. We all know that the Western Company has received judgment against this company in Kern County for \$44,078.05 and what I propose to do is this. I will get judgment and if the property is redeemed by the company, I will wait for my salary until there is money enough in the treasury to pay me, but should the property not be redeemed then, I want my judgment to stand so I will have something to show for my twenty-eight and a half months' time and labor.

W. H. MCKITTRICK.

The secretary then reported that since the date of the above letter, judgment against the company had been granted W. H. McKittrick in Cochise County, Arizona, for the sum of \$9,975.00 with costs for twenty-eight and a half months' salary at

244 \$250.00 per month.

On motion of F. S. Rice duly seconded and by the unan-

imous vote of all the directors present, the sum of \$250.00 per month from January 26th, 1903 be allowed W. H. McKittrick as General Manager and Secretary for the company and that the same is hereby ratified and confirmed.

The secretary then reported that on June 13th, 1905, he had sent by registered mail a copy of the following letter to Jepp Ryan, T. C. Ryan and E. B. Ryan:

ROOM 1013, MUTUAL SAVINGS BUILDING,
SAN FRANCISCO, CAL., Jun- 13, 1905.

Messrs. Jepp Ryan, T. C. Ryan and E. B. Ryan, Leavenworth, Kansas.

GENTLEMEN: We have advised you from time to time the Turquoise C. M. & S. Co. was obliged to borrow from the Western Company, a California corporation, at different times, the sum of money aggregating, in all, the total of \$39,303.33 principal and \$4,567.97 interest, on the 24th day of last May. The Western Company has frequently demanded of the mining company the repayment of these funds. We have kept you advised of this condition of affairs and have asked you to join us in meeting this indebtedness, but up to date have received no favorable reply. On the 24th day of May last, above mentioned, The Western Company secured judgment against the Turquoise C. M. & S. Co. in the sum of \$39,303.33. Interest \$4,567.97 Attorney's fees 200.00 Cost of suit 6.75 together with interest on all of said sums at the rate of seven per cent per annum from date until paid. The natural consequence is that the property of the mining company, will, in the near future, be sold to the highest bidder to satisfy this judgment. It is the purpose of this letter to advise you that the Western Company, from whom the company borrowed the money above mentioned, is practically controlled by Mr. Tevis whose family own all of its stock. Through his influence, we have succeeded in staying execution under this judgment long enough to give me the opportunity of asking each of you to join me in one last effort to save the property, by contributing your proportion of the amount necessary to repay the Western Company, to wit: Jepp Ryan 69,875 shares, T. C. Ryan 139,750 shares, E. B. Ryan 69,875 shares and 99,000 shares held in trust by me for the Ryan Bros., Total 378,500 shares. It is proposed therefore to levy an assessment (which of course will have to be voluntary) of five cents per share upon the stock of the corporation, which will give us \$50,000.00 with which to meet the indebtedness to the Western Company and leave a sufficient sum in the treasury for our immediate necessities. I have submitted the proposition to all the California stockholders and they have all consented to stand this assessment. You will realize that we must act promptly in this matter. Should you decide that you are not willing to pay your pro rata, there is nothing left for us to do but to permit the property to be sold to pay the debt. I hope you will give this matter serious consideration and wire me immediately upon receipt of this letter what action you will take in the premises.

Yours very truly,

W. H. MCKITTRICK,
Sec'y T. C. M. & S. Co.

The secretary then said, that on the 24th day of May, 1905 the Western Company had secured judgment in Kern County, California, for \$44,078.05 and that on the 20th day of July, 246 1905 for the same claim a judgment in Cochise County, Arizona, for \$44,549.43 and costs.

That on the 20th day of July 1905, W. H. McKittrick had secured judgment in Cochise County, Arizona, for \$9,975.00. That on August 12th, 1905, the Turquoise C. M. & S. Co. property at Gleason, Arizona, had been sold by the sheriff of the county to satisfy both judgments amounting with costs to \$45,757.53 and \$10,491.30.

That the Western Company had bid in the property for \$56,-248.83 and that the Turquoise C. M. & S. Co. had six months from date of sale to redeem the property.

The secretary then reported that the company owed to L. I. Theirs, who is the care taker of the company property at Gleason wages for June \$90.00 and for July \$93.00.

To Soto Bros. & Renaud for wages, store bill for repairs necessary at the mine for the months of April, May, June and July \$314.01.

To W. H. McKittrick balance due on books of Company \$59.84, expenses to going to mine in May, July and August \$242.05.

To Chas. Bowman, attorney for the company up to July 1st, 1900, \$64.86 the balance of \$35.14 being paid by check on the First Nat. B'k of Tombstone.

To John Gleeson for assessment work done on claim \$266.66.

The total amount of these claims being \$1,140.92 and that the company only have the following amount to their credit. First Nat.

B'k, Bakersfield \$8.66 Citizens Nat. B'k, Los Angeles, \$33.97 247 due from Baker & Hamilton \$18.50 Total \$61.13.

Moved by director Rice, seconded by director W. H. McKittrick that the secretary and general manager of this company be authorized, empowered and directed to sell at private sale such of the personal property of the Turquoise C. M. & S. Co. as may not have been included in the judgment and execution secured by the Western Company and from the proceeds of such to pay the debts of the company now existing.

The motion was unanimously carried.

There being no further business before the meeting of the board of directors, on motion made and duly seconded, meeting adjourned.

WILLIAM S. TEVIS,

Vice-President.

W. H. MCKITTRICK, *Secretary.*

Special meeting of the board of directors of the Turquoise Copper Mining & Smelting Co. held in the rooks of the First National Bank at Bakersfield, Cal. January 2nd, 1906.

Meeting called to order by Vice-President W. S. Tevis. There was present beside him F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice the reading of the minutes of the last meeting were dispensed with.

The secretary then stated that he had the consent of the stockholders of this corporation, who represent 621,500 shares of its capital stock, to call a special meeting of the stockholders to be held at the company office in Bakersfield, Cal. On motion of F. S. Rice seconded by W. H. McKittrick and by the unanimous vote of all of the directors present, the secretary was authorized to call a special meeting of the stockholders of this corporation to be held at its office in Bakersfield Cal., on January 26th, 1906 at ten o'clock A. M.

248 There being no further business before the meeting on motion made and duly seconded, meeting adjourned.

WILLIAM S. TEVIS,

Vice-President.

W. H. MCKITTRICK, *Secretary.*

On motion of F. S. Rice seconded by W. H. McKittrick and by the unanimous vote of all of the directors present, Charles Bowman of Tombstone, Arizona, was appointed attorney in fact for and in its name to make application to the United States for the entry and purchase of certain Government lands in the Turquoise Mining District, Cochise County, Arizona, known as the Tip Top and Tip Top No. 2 mining claims.

W. H. MCKITTRICK, *Secretary.*

Special meeting of the board of directors of the Turquoise Copper Mining & Smelting Co. held in the rooms of the First National Bank at Bakersfield, Cal. January 26th, 1906.

Meeting called to order by President W. R. Shafter.

There was present beside him, W. S. Tevis, F. S. Rice and W. H. McKittrick.

On motion made by F. S. Rice, the minutes of the special meeting held August 21st, 1905 and the minutes of the special meeting held January 2, 1906 were read and approved.

The general manager then stated that he had been unable to sell the company 12 H. P. gasoline engine on the Gleason claim although he had advertised the sale of same in the Tombstone Prospector for several weeks.

W. H. McKittrick then stated that he had paid personally the company debts as follows and they owed him:

Balance due from Company as per statement made Aug.	
21st to him	\$59.80
Check paid to McKittrick Citizens Nat. Bank	33.92
	<hr/>
	25.92
249 Trip to mine May and July \$120.00 August	
\$121.90	242.05
Soto Bros. & Renaud bill	314.51
John Gleeson assessment acc't Gleeson & O'Brien claims. .	291.66
Trip to mine October	11.25

Wages to L. S. Thiers as per bill	480.09
Land office, patents for deeds	14.00
County taxes	41.64
	<hr/>
	\$1,421.12

That the company also owes as per bills:

Soto Bros. & Renaud assessment work	344.55
Tombstone prospector's bill	12.50
	<hr/>
	1,778.17

The secretary then read the inventory of the company property that had not been attached by the sheriff.

On motion of F. S. Rice seconded by W. S. Tevis and by the unanimous vote of all of the directors present, the general manager of the company, be again, authorized, empowered and directed to sell at private sale such of the personal property of the Turquoise C. M. & S. Co. as may not have been included in the judgment and execution secured by the Western Company and from the proceeds of such sale to pay the debts of the company now existing.

There being no further business before the board on motion made and duly seconded, meeting adjourned.

WM. R. SHAFTER.

W. H. McKITTRICK, *Secretary*.

Special Meeting of the Stockholders of the Turquoise Copper Mining & Smelting Co., Held in the Rooms of the First National Bank, in the Producers' Savings Bank Building, Bakersfield, Cal., January 26th, 1906.

250 Due notice of this special meeting of the stockholders of the Turquoise Copper Mining & Smelting Co. was given according to Article 4, section 3 being published three times a week for two weeks in a daily newspaper in the City of Tombstone, Arizona, known as the Tombstone Prospector.

Notice also given by registered mail to Jepp Ryan, E. B. Ryan and T. C. Ryan.

All the other stockholders were personally notified by W. H. McKittrick, secretary of the company.

Meeting called to order by President W. R. Shafter.

Stockholders present, W. R. Shafter in person representing	100 shares
W. S. Tevis in person representing	140,100 "
F. S. Rice " "	100 "
W. H. McKittrick " "	160,100 "

J. H. Keith	by proxy	W. S. Tevis.....	10,000	"
J. M. Quay	"	"	2,000	"
C. E. Worden	"	"	100	"
H. A. Jastro	"	"	208,000	"
W. H. McKittrick, trustee for W. S. Tevis & W. H. McKittrick.....			101,000	"
			<hr/> 621,500	"

Representing 621,500 shares of the capital stock of the Turquoise Copper Mining & Smelting Co.

W. H. McKittrick, general manager of the company then made a report on the company affairs from October 5th, 1904 to date.

W. H. McKittrick, secretary of the company made a full report and also of the finances of the company since October 5th, 1904 to date.

The report from the First National Bank, Treasurer of the company was then made.

251 The secretary read the minutes of all of the directors' meetings of the Turquoise C. M. & S. Co. which show plainly the existing condition of the affairs the company and he also stated that this special meeting of the stockholders of the Turquoise C. M. & S. Co. was called to devise some way to pay the debts of the company and to redeem the property from the sheriff's sale. That the stockholders at this meeting represented 621,500 shares of the Turquoise C. M. & S. Co. and that all were willing to stand a voluntary assessment of six cents per share on this stock if Jepp Ryan, T. C. Ryan and E. B. Ryan (who are the minority stockholders) would also pay a voluntary amount on their stock of six cents per share.

That it was a great disappointment to all of the stockholders present that Jepp Ryan, T. C. Ryan and E. B. Ryan were not present or represented by proxy and that it was also a fact that none of the officials of the Turquoise C. M. & S. Co., had ever heard from Jepp Ryan, E. B. Ryan or T. C. Ryan directly or indirectly for several months and that the registered letters had never been answered although the registered cards had been returned bearing their signatures.

W. S. Tevis then stated that every effort had been made by the board of directors of the Turquoise C. M. & S. Co. to keep this company in existence and that the stockholders had until February 12th, 1906 to redeem the property.

On motion of F. S. Rice, seconded by W. S. Tevis the secretary was instructed to send by registered mail a copy of the minutes of this meeting to Jepp Ryan, E. B. Ryan and T. C. Ryan.

On motion of F. S. Rice seconded by W. S. Tevis and by
252 the unanimous vote of all of the stockholders present and represented, All of the official acts of the President, Vice President, Secretary, Treasurer, General Manager and the board of directors and all of the minutes of previous meetings of stockholders and board of directors were approved and stand approved by a vote

of 621,500 shares of stock representing a majority of the capital stock of the Turquoise Copper Mining & Smelting Co. as follows:

W. H. McKittrick	in person representing.....	160,000	shares
J. M. Keith	by proxy W. S. Tevis.....	10,000	"
J. M. Quay	" ".....	2,000	"
C. E. Worden	" ".....	100	"
H. A. Jastro	" ".....	208,000	"
W. R. Shafter	in person representing.....	100	"
F. S. Rice	" ".....	100	"
W. S. Tevis	" ".....	140,100	"
W. H. McKittrick	" Trustee W. H. McKit-		
trick & W. S. Tevis.....		101,000	"
		<hr/>	
		621,500	"

On motion of F. S. Rice seconded by W. S. Tevis, the meeting of the stockholders of the Turquoise Copper Mining & Smelting Co. was adjourned sine die.

WM. R. SHAFter.

W. H. McKITTRICK, *Secretary*.

Special Meeting of the Board of Directors of the Turquoise Copper Mining & Smelting Co., Held in the Rooms of the First National Bank at Bakersfield, Cal., July 17th, 1906.

Meeting called to order by vice president W. S. Tevis. There was present beside him F. S. Rice and W. H. McKittrick.

On motion of F. S. Rice the minutes of the special meeting 253 of the board of directors held Jan'y 26th, 1906 were read and approved.

The general manager then stated that he had advertised and sold at public auction at the office of the company at Gleeson, Arizona to H. B. Chase the highest bidder \$2,500.00 all of the personal property of the company that had not been included in the judgment and execution secured by the Western Company.

On motion of F. S. Rice seconded by W. H. McKittrick and by the unanimous vote of all of the directors present, the sale of all of the personal property of the company for \$2,500.00 was approved.

The general manager then stated that he had paid personally all of the bills against the company as follows:

Balance due from company as per statement August 21st,	
1905.....	\$59.84
Check Citizens' Nat. Bank Cash.....	33.92
	<hr/>
	\$25.92
Trip to mine May and July \$120.15, August \$121.90....	242.05
P'd Soto Bros. & Renaud's bill.....	314.51
O'Brien claims, assessment work done by Gleeson.....	291.66

Trip to mine October.....	11.25
Paid for deeds for patents.....	14.00

\$899.39

Wages to L. S. Thiers.....	480.00
Taxes	40.00
Surveys, general maps & plats (check to Chas. Bowman) ..	41.64
Tombstone Prospector, advertising sale 12.50, 5.00.....	17.50
Soto Bros. & Renaud bill.....	348.55
Wages L. I. Thiers.....	250.00
" "	65.25
Soto Bros. & Renaud bill.....	7.15
Rockfellow, surveying	35.89
Hall, County Recorder, abstracts Tip Top.....	28.25

\$2,213.71

Cash returned from U. S. Land Office.....	70.00
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\$2,143.71

254 On motion of F. S. Rice seconded by W. H. McKittrick and by the unanimous vote of all of the directors present, W. H. McKittrick was instructed to draw a check on the First National Bank, Treasurer of the company for \$2,143.71 to pay his account against the company and to also draw checks for the balance of the money held by the First National Bank, treasurer of the company for \$364.95 and to hold said \$364.95 until called for by the Board of Directors.

The general manager and secretary then asked to have his accounts audited by the board of directors.

There being no further business before the board, meeting duly adjourned.

WILLIAM S. TEVIS,
Vice President.

W. H. MCKITTRICK, *Secretary.*

(PLAINTIFF'S EXHIBIT C.)

Soto Brothers, General Merchandise.

WILLCOX, ARIZONA, Dec. 11th, 1902.

To William S. Tevis, Esq., President of the T. C. M. and S. Co.,
Bakersfield, Cal.

DEAR SIR: I hereby tender my resignation as Secretary and Treasurer of the Turquoise Copper Mining and Smelting Co. to take effect at once.

P. B. SOTO.

(PLAINTIFF'S EXHIBIT D.)

In the District Court, Second Judicial District, in the County of Cochise, Territory of Arizona.

THE WESTERN COMPANY, a Corporation, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation, Defendant.

Default.

In this action the defendant Turquoise Copper Mining & Smelting Co., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant Turquoise Copper Mining & Smelting Co. in the premises is hereby duly entered according to law. Attest my hand and the seal of said Court this 12th day of July, 1905.

[SEAL.]

GEO. B. WILCOX, *Clerk*.

By PHILO WILCOX, *Deputy Clerk*.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for Cochise County.

THE WESTERN COMPANY, a Corporation, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation, Defendant.

Comes now the plaintiff and complains of the defendant, and for cause of action, alleges:

I. That the plaintiff is now, and at all the times herein mentioned was and has been a corporation, duly organized and existing under and by virtue of the laws of the State of California, and doing business in the county of Kern in the State of California.

II. That the defendant is now, and at all the times mentioned herein was and has been a corporation, duly organized and existing under and by virtue of the laws of the Territory of Arizona, and doing business in Cochise County in said Territory.

III. That at the times hereinafter mentioned, the Superior Court, in and for the County of Kern, in the State of California, was a Court of general jurisdiction, duly created and organized by the laws of the state.

IV. That on the 28th day of April, A. D. 1905, the above named plaintiff commenced an action in said court against the defendant by the issuance of summons, which summons was duly and personally served upon the said defendant.

V. That thereupon such proceedings were had therein in said Court, that on the 24th day of May, A. D. 1905, a judgment for the sum of Thirty nine thousand three hundred and three dollars and

thirty three cents principal, forty-five hundred and sixty seven dollars and ninety seven cents, interest, and \$200.00 attorneys' fees, and \$6.75 costs of suit, was duly given and made by said Superior Court in favor of the plaintiff and against the defendant.

VI. That the plaintiff is still the owner and holder of the said judgment and the debt secured thereby, and that no part of the same has been satisfied or paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Forty four thousand and seventy eight dollars and five cents, together with interest thereon at the rate of seven per cent per annum from the 24th day of May, A. D. 1905, until paid, and for costs.

H. L. PICKETT,
Attorney for the Plaintiff.

Endorsed: No. 3968. In the District Court Second Judicial District, Cochise County, Arizona. The Western Company, a Corporation, plaintiff, vs. The Turquoise Copper Mining and Smelting Company, a Corporation, Def't. Complaint. Filed Jun- 20, 1905. Geo. B. Wilcox, Clerk Dis't Court, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for Plaintiff.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

257 THE WESTERN COMPANY, a Corporation, Plaintiff,
vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation, Defendant.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and the Complaint Filed in the said County of Cochise, in the Office of the Clerk of said District Court.

The Territory of Arizona sends Greeting:

Turquoise Copper Mining and Smelting Company, a corporation.

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise and to answer the complaint filed therein within twenty days (exclusive of the day of service), after the service on you of this summons (if served within the county; otherwise within thirty days), or judgment by default will be taken against you according to the prayer of said complaint. Given under my hand and the seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 20th day of June, in the year of our Lord one thousand nine Hundred and 5.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX,
Deputy Clerk.

OFFICE OF THE SHERIFF OF THE
COUNTY OF COCHISE.

I hereby certify that I received the within summons on the 21st day of June, 1905 and personally served the same on the 21st day of June, 1905, on P. B. Soto, agent of the Turquoise Copper Mining & Smelting Co., a corporation, being the defendant named in 258 said summons, by delivering to P. B. Soto, agent, said defendant personally in the third precinct County of Cochise a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 21st day of June, 1905.

R. S. HUNT, *Sheriff*,
By BUD SNOW,
Deputy Sheriff.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for Cochise County.

THE WESTERN COMPANY, a Corporation, Plaintiff,
vs.

TURQUOISE COPPER MINING AND SMELTING CO., a Corporation,
Defendant.

Findings and Decision.

This cause coming on regularly this day for trial before the court sitting without a jury, H. L. Pickett, Esq., appearing as attorney for plaintiff. No appearance being made by the defendant; it having been duly and personally served with process in Cochise County, and the time allowed by law for answering having expired, and no answer or demurrer being filed, the default of the defendant The Turquoise Copper Mining and Smelting Co. was duly entered according to law.

Whereupon witnesses were sworn and examined and documentary evidence introduced, and from which testimony the Court finds the following facts:

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California and doing business in Kern County in the state of California. That the defendant The Turquoise Copper Mining and Smelting Co. is a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona; that Pablo B. Soto, a 259 bona fide resident of the county of Cochise and Territory of Arizona, for more than three years prior to his appointment as such, is the duly appointed resident agent of said defendant corporation, residing at Willcox, Cochise County, Arizona, and that the defendant corporation is doing business in Cochise County, Arizona.

That the defendant was duly and personally served with summons

and a true and correct copy of the complaint attached to said copy of the summons in this action, on the 21st day of June, A. D. 1905, by the sheriff of Cochise County, by delivering to Pablo B. Soto, the agent of defendant corporation, personally in Cochise County, a copy of said summons and a true and correct copy of the complaint attached to said copy of summons. That more than twenty days have elapsed since the date of the said service of Pablo B. Soto, the agent of defendant company. That no answer or appearance has been made by the defendant company to the complaint on file herein.

That the default of the said defendant The Turquoise Copper Mining and Smelting Company, a corporation, has been duly entered by the Clerk in accordance with law.

That the Superior Court in and for Kern County in the state of California, was on the 28th day of April 1905, and ever since that date has been, a Court of general jurisdiction, duly created and organized by the laws of that state.

That on the 28th day of April 1905, the plaintiff, The Western Company, a corporation, commenced an action in said Superior Court of Kern County, state of California, against the defendant

260 The Turquoise Copper Mining and Smelting Co., a corporation, by the issuance of summons; that said summons was duly and personally served upon the defendant in said action.

That such proceedings were had in said action in said Superior Court that on the 24th day of May, A. D. 1905, a judgment for the sum of thirty nine thousand three hundred and three dollars and thirty-three cents principal, forty five hundred and sixty seven dollars and ninety seven cents interest, two hundred dollars attorney's fees and \$6.75 costs of suit was duly given, made and entered by said Superior Court in favor of the plaintiff and against the defendant.

Plaintiff offers in evidence a duly certified and authenticated copy of the said judgment of the said Superior Court, and files the same as evidence herein.

That the plaintiff is the owner and holder of the said judgment and the debt evidenced thereby, and that no part of the same has been paid.

Wherefore the Court, from the foregoing facts, finds and decides as conclusions of law: That the court has jurisdiction of the parties and the subject matter of this action.

That the plaintiff is entitled to a judgment against the defendant The Turquoise Copper Mining and Smelting Co., a corporation, in the sum of forty four thousand and seventy eight dollars and five cents, together with interest thereon at the rate of seven per cent per annum from the 24th day of May, A. D. 1905, until paid, and is entitled to recover his costs herein. Let judgment be entered accordingly.

Done in open Court this the 20th day of July, A. D. 1905.

FLETCHER M. DOAN, Judge.

Endorsed: #3968. District Court Second Judicial District, Cochise County, Arizona. The Western Company, corporation, Pl'ff, vs. The Turquoise Copper Mining & Smelting Co., corporation, Def't. Findings & Decision. Filed Jul- 20, 1905. Geo. B. Wilcox, Clerk Dist. Court, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for Pl'ff.

In the District Court of the Second Judicial District Territory of Arizona in and for Cochise County.

THE WESTERN COMPANY, a Corporation, Plaintiff,
vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation, Defendant.

Memorandum of Costs and Disbursements.

Disbursements.

Sheriff's fees.....	\$12.15
Clerks Fees.....	\$8.20
Court reporter's fees transcribing notes.....	\$1.00
	<hr/>
	\$21.35

TERRITORY OF ARIZONA,
County of Cochise, ss:

H. L. Pickett being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff. That the items in the above-memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

H. L. PICKETT.

Subscribed and sworn to before me this 20th day of July, 1905.

[SEAL.]

GEO. B. WILCOX, Clerk,
By PHILO WILCOX,
Deputy Clerk

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

Cause No. 3968.

THE WESTERN COMPANY, a Corporation,
vs.
THE TURQUOISE COPPER MINING COMPANY.

Reporter's Transcript of Evidence.

Trial on the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise,
262 Before His Honor, Fletcher M. Doan, Judge Sitting,
Without a Jury, at the Court House in the City of Tombstone, on the 10th Day of July, A. D. 1905.

Appearances:

For the Plaintiff, Pickett & Bowman.

For the Defendant, No appearance.

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EXHIBIT "A."

Certified Copy of Judgment.

TOMBSTONE, ARIZONA, Thursday, July 20, 1905.

Col. PICKETT: This is brought on a certified judgment, Your Honor, and that is all the testimony there will be.

The COURT: Very well.

Col. PICKETT: We now offer in evidence the certified copy of a judgment from the Superior Court of the County of Kern, state of California, in the case wherein the Western Company, a corporation, is the plaintiff and the Turquoise Copper Mining and Smelting Company, a corporation, was defendant. It is a judgment for \$39,303.33 principal, \$4,567.97 interest and \$200.00 attorney's fees, and \$6.75 costs.

The COURT: Let it go in.

Said certified copy of judgment was marked Exhibit "A" and was introduced in evidence, and is on file in the office of the Clerk of the District Court of the Second Judicial District in and for the county of Cochise, among the papers in this cause.

The above statement of the evidence in the above-entitled cause is hereby approved.

FLETCHER M. DOAN,
Presiding Judge.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, John W. Walker, Official Court Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise do hereby certify that the above and foregoing 2 pages of typewritten matter constitute and contain a full, true and correct copy of all questions propounded to
 263 witnesses, and their answers thereto in the case wherein The Western Company is plaintiff, and Turquoise Copper Mining Co. is defendant, cause No. — as well also as all remarks, rulings, opinions and judgments given and rendered during the trial thereof by the judge presiding at the trial, and that they contain all the oral evidence given in the cause.

In witness whereof, I have hereunto set my hand in my official capacity as such reporter, at Tombstone, in said county and Territory this 20th day of July, 1905.

JOHN W. WALKER,

*Official Reporter Second Judicial District,
 Territory of Arizona, in and for Cochise County.*

Endorsed: No. 9968. In the District Court Second Judicial District County of Cochise Territory of Arizona. Western Company, Plaintiff, vs. Turquoise Copper Mining Co., Defendant. Statement of Evidence. Filed Aug 1, 1905. Geo. B. Wilcox, Clerk Dist. Court, by Philo Wilcox, Deputy.

In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

THE WESTERN COMPANY, a Corporation, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation, Defendant.

Judgment.

In this action, the defendant The Turquoise Copper Mining and Smelting Company, a corporation, having been duly and regularly served with summons and a copy of the complaint in this action, personally in Cochise County, and having failed to appear and answer the plaintiff's complaint filed herein, and the legal time for answering having expired, and no answer or demurrer having been filed, and the default of the defendant The Turquoise Copper Mining and Smelting Co. corporation, having been duly entered according to law. H. L.
 264 Pickett, Esq., appeared as attorney for the plaintiff, and witnesses were sworn and examined and documentary evidence introduced in behalf of the plaintiff, and the cause was submitted to the court for its decision, and after due deliberation, the court files

its findings and decision in writing, and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid it is ordered, adjudged and decreed that the Western Company, a corporation, plaintiff, do have and recover of and from the defendant The Turquoise Copper Mining and Smelting Co. a corporation, the sum of forty four thousand and seventy eight dollars and five cents, principal, and four hundred & seventy one $38/100$ dollars and thirty eight cents, interest thereon from the 24th day of May, 1905, to this date; amounting in the aggregate to the sum of forty four thousand and five hundred and forty nine dollars and forty three cents, together with interest on the latter amount from the date hereof at the rate of seven per cent per annum until paid, and \$21.35/100 dollars and cents plaintiff's costs herein incurred. And it is further ordered that plaintiff have execution therefor.

Done in open Court this 20th day of July, A. D. 1905.

FLETCHER M. DOAN, *Judge*.

Endorsed: #3968. District Court second Judicial District County of Cochise, Arizona. The Western Company, a corporation, Pl'ff, vs. The Turquoise Copper Mining and Smelting Co. a corporation, Def't Judgment. Filed Jul- 20, 1905. Geo. B. Wilcox, Clerk Dist. Court, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for Pl'ff.

265 In the District Court of the Second Judicial District of the Territory of Arizona, County of Cochise.

THE WESTERN COMPANY, a Corporation, Plaintiff,

vs.

TURQUOISE COPPER MINING & SMELTING Co., a Corporation, Defendant.

I, the undersigned clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in judgment book 5 of said court, at page 174. And I further certify that the foregoing papers hereto annexed constitute the judgment roll in said action. Witness my hand and seal of the District Court this 20th day of July 1905.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy Clerk*.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, George B. Wilcox, Clerk of the District Court of the second Judicial District of the Territory of Arizona, in and for the county of Cochise, do hereby certify that the within and foregoing is a full, true and correct transcript and copy of the judgment roll in the cause entitled: The Western Company vs. Turquoise Copper Mining

& Smelting Company, #3968, said judgment roll being composed of the following pleadings and papers, viz: Complaint, with default thereto attached; Summons; Findings of Fact and Conclusions of Law; Memorandum of costs; reporter's transcript of evidence; judgment and judgment roll cover, together with the endorsements on or upon each one of said pleadings and papers. Given under my hand and the seal of said Court hereto attached, this 17th day 266 of December, A. D. 1908, at my office in the city of Tombstone, county and territory aforesaid.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By P. MICHELENA,
Deputy Clerk.

(PLAINTIFF'S EXHIBIT E.)

In the District Court, Second Judicial District, in the County of Cochise, Territory of Arizona,

WM. H. MCKITTRICK, Plaintiff,

vs.

TURQUOISE COPPER MINING & SMELTING CO., a Corporation,
Defendant.

Default.

In this action the defendant Turquoise Copper Mining & Smelting Co. having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant Turquoise Copper Mining & Smelting Co. in the premises is hereby duly entered according to law. Attest my hand and the seal of said Court, this 12th day of July, 1905.

[SEAL.]

GEO. B. WILCOX, *Clerk*.
PHILO WILCOX,
Deputy Clerk.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

WILLIAM H. MCKITTRICK, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING COMPANY, a Corporation,
Defendants.

The plaintiff complains of the defendant, and for cause of action, alleges:

1. That the plaintiff is a resident of the county of Kern in the state of California; that the defendant is a corporation duly organized and existing under and by virtue of the laws of the Territory

267 of Arizona, and at all the times hereinafter mentioned was
 sub a corporation and was doing business in Cochise county
 in said territory.

II. That the defendant is indebted to this plaintiff in the sum of nine thousand and nine hundred and seventy five dollars, for work and services rendered by the plaintiff to the defendant, at its special instance and request, as general manager of defendant corporation, between the first day of January, A. D. 1903, and the fifteenth day of June, A. D. 1905.

III. That the said services were and are reasonably worth the sum of three hundred and fifty dollars per month, amounting in all to the sum of nine thousand and nine hundred and seventy five dollars, all of which became due and payable on the 15th day of June 1905.

IV. That the defendant has not paid the said sum, nor any part thereof; that the whole thereof remains due, owing and unpaid from the defendant to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of nine thousand and nine hundred and seventy five dollars and for costs of suit.

H. L. PICKETT,
Attorney for the Plaintiff.

Endorsed: No. 3969. In the District Court, Second Judicial District, Cochise County, Arizona. W. H. McKittrick, plaintiff, vs. The Turquoise Copper Mining and Smelting Co., a corporation, defendant. Complaint. Filed Jun- 20 1905. Geo. B. Wilcox, Clerk Dist. Court, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for plaintiff.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

WILLIAM H. MCKITTRICK, Plaintiff,
 vs.

268 TURQUOISE COPPER MINING AND SMELTING COMPANY, a
 Corporation, Defendant.

Action Brought in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise and the Complaint Filed in the said County of Cochise, in the Office of the Clerk of said District Court.

The Territory of Arizona sends greeting to Turquoise Copper Mining and Smelting Company, a Corporation:

You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service), after the service on you of this summons (if served within the county; otherwise within thirty

days), or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the seal of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, this 20th day of June, in the year of our Lord one thousand nine hundred and five.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy Clerk*.

Office of the Sheriff of the County of Cochise.

I hereby certify that I received the within summons on the 21st day of June, 1905, and personally served the same on the 21st day of June, 1905, on P. B. Soto, agent of the Turquoise Copper Mining & Smelting Co., a corporation, being the defendant named in said summons, by delivering to P. B. Soto, agent, said defendant personally in the third precinct county of Cochise a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Dated this 21st day of June, 1905.

R. S. HUNT, *Sheriff*,
By BUD SNOW,
Deputy Sheriff.

In the District Court of the Second Judicial District, Territory of Arizona, in and for Cochise County.

W. H. MCKITTRICK, Plaintiff,
vs.

TURQUOISE COPPER MINING & SMELTING Co., a Corporation,
Defendant.

Memorandum of Costs and Disbursements.

Disbursements.

Sheriff's fees.....	\$12.15
Clerk's fees.....	8.30
Court reporter's fees, transcribing notes.....	3.00

TERRITORY OF ARIZONA, ss:	\$23.45
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County of Cochise ss:

H. L. PICKETT, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said Plaintiff. That the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action.

H. L. PICKETT.

Subscribed and sworn to before me this 20th day of July 1905.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy Clerk*.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

Cause No. 3969.

WILLIAM H. MCKITTRICK

vs.

THE TURQUOISE COPPER MINING COMPANY.

Reporter's Transcript of Evidence.

Trial in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise,
270 Before His Honor, Fletcher M. Doan, Judge Sitting, Without a Jury, at the Court-House, in the City of Tombstone, on the 10th Day of July, A. D. 1905.

Appearances:

For the plaintiff, Pickett & Bowman.

For the Defendant, no appearance.

Index:

William H. McKittrick 2.

TOMBSTONE, ARIZONA, *Thursday, July 10, 1905.*

WILLIAM H. MCKITTRICK, being called as a witness in his own behalf, and being duly sworn according to law, testified as follows:

Direct examination by Col. PICKETT:

Q. State your name Captain, and your place of residence?

A. William Holmes McKittrick.

Q. Are you the plaintiff in this case of William H. McKittrick vs. The Turquoise Copper Mining and Smelting Company?

A. I am.

Q. State to the court when you were employed by this company and how long you served them, and what kind of services you rendered?

A. Some over twenty-nine months, I think it was something about the 25th or 6th of January 1903 to the time that the paper was served.

Q. 1903?

A. Yes sir.

Q. State to the court the character of the service Captain; what was the character of the service and what kind of property did this company have in this territory that you were looking out for?

A. The mining property over in the Turquoise district; I have been the general manager; in fact, I am still the general manager of the company.

Q. What service did you have to perform?

A. I had to do everything.

Q. I will ask you if three hundred dollars a month is a reasonable compensation for the services you rendered?

A. Very reasonable I consider.

Q. I will ask you what the directors think about it?

— They were only too willing to pay me, but they had no money in the treasury. I had everything to do, as selling
271 the stock, negotiating the loans and everything to do with the company; nobody else took a hand in it.

The COURT: What is the probable value of the property, Captain?

A. These claims, we paid seventy thousand dollars for some of them, and then other claims that we bought, I should think about ten thousand; possibly eight thousand dollars.

Examination by the COURT:

Q. How many claims constitute the group?

A. Why, I think there are six patented claims, two unpatented claims, and then six claims that we hold one third interest in.

Q. Was there anything said between the corporation and yourself relative to your salary?

A. It was understood I was to receive a good salary, and should there have been enough money to pay me I would have got it, but I allowed my salary to go in to develop the property, but there will be a judgment now served against them and I want to be protected.

Q. What is that?

A. There is a judgment to be served.

Q. What I wanted to get at was what, if anything, was ever said relative to the amount of your compensation towards fixing your salary?

A. Yes, I think I could have had more money; I could have had four hundred dollars, but I thought I wouldn't take that.

Q. You operated the property in this county?

A. Yes.

Q. It is at Gleason?

A. Yes sir.

Q. I understand that from your conversation with the directors and officers of the company that the amount of three hundred and fifty dollars per month would have been satisfactory to them as the amount of your salary?

A. Yes sir, they would have paid me if there had been any money in the treasury.

272 Q. There was no question regarding the amount of your salary; the only question was as to the funds?

A. That is all.

Q. Have they any agent in the county at this time?

— Yes sir.

Q. Mr. R. B. Soto?

A. At Willcox, yes sir.

Witness excused.

The foregoing statement of the evidence in the above entitled cause is hereby approved.

FLETCHER M. DOAN,
Presiding Judge.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, John W. Walker, Official Court Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise, do hereby certify that the above and foregoing 5 pages of typewritten matter constitute and contain a full, true and correct copy of all questions propounded to witnesses, and their answers thereto in the case wherein William H. McKittrick is plaintiff, and Turquoise Copper Mining Co., is defendant, Cause No. — as well also as all remarks, rulings, opinions and judgments given and rendered during the trial thereof by the judge presiding at the trial and they contain all the oral evidence in the cause. In witness whereof, I have hereunto set my hand in my official capacity as such reporter, at Tombstone, in said county and Territory this 20th day of July 1905.

JOHN W. WALKER,
*Official Court Reporter, Second Judicial District,
Territory of Arizona, in and for Cochise County.*

Endorsed: No. 3969. In the District Court Second Judicial District County of Cochise Territory of Arizona. William H. McKittrick, plaintiff, vs. Turquoise Copper Mining Company, 273 defendant. Filed Aug. 1 1905. Geo. B. Wilcox, Clerk, Dis. Court By Philo Wilcox, Deputy. — — —, Plaintiff's Attorney.

In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

WILLIAM H. MCKITTRICK, Plaintiff,
vs.
THE TURQUOISE COPPER MINING AND SMELTING Co., Corporation,
Defendant.

Findings and Decisions.

This cause coming on this day regularly for trial before the Court sitting without a jury, H. L. Pickett, Esq., appearing as attorney for the plaintiff. No appearance being made by the defendant The Turquoise Copper Mining and Smelting Co. corporation. It having been duly and personally served with summons and a copy of the complaint in this action in Cochise County, and having failed to appear and answer the complaint, and the default of the defendant Company having been duly entered by the Clerk in accordance with law. Whereupon witnesses were sworn and examined in behalf of the plaintiff, and the cause being submitted to the court for

its decision, and the court being fully advised in the premises from the evidence introduced, finds the following facts: That the plaintiff is a resident of Kern County in the state of California. That the defendant The Turquoise Copper Mining and Smelting Company, is a corporation duly organized and existing under and by virtue of the laws of the Territory of Arizona. That P. B. Soto, who is and has been for more than three years last past, and for more than three years before his appointment by said defendant company, a bona fide resident of the Territory of Arizona and of

274 Cochise County in said territory, residing at the town of Willcox in said Cochise county, is the duly appointed resident agent of said defendant The Turquoise Copper Mining and Smelting Co. corporation. That the defendant corporation is doing a mining business in Cochise County, Arizona.

That the plaintiff worked and performed services and labor for the defendant company, as the general manager of the defendant company, at its special instance and request from the first day of January, A. D. 1903 to and including the 15th day of June A. D. 1905.

That the defendant The Turquoise Copper Mining and Smelting Co., corporation, was personally served with summons and a copy of the complaint in this action in Cochise County, on the 21st day of June, A. D. 1905 by the sheriff of Cochise county; that such service was made by delivering to Pablo B. Soto, the agent of said defendant company, personally, at the town of Willcox in said county, a copy of the summons and a true copy of the complaint in this action attached to said copy of summons.

That more than twenty days have elapsed since the date of said service, and no answer or appearance has been filed by the defendant.

That the default of said defendant The Turquoise Copper Mining and Smelting Co. corporation has been duly entered according to law by the Clerk of this Court.

That the services rendered by the plaintiff to the defendant as general manager of defendant company, is reasonable worth the sum of \$350.00 per month, amounting in the aggregate to the sum of \$9,975.00.

275 That the same is due and payable and that no part of the same has been paid, and the whole thereof remains due, owing and unpaid from the defendant company to the plaintiff.

From the foregoing facts, the court finds and decides as conclusions of law: That this court has jurisdiction of the parties and of the subject matter of the action. That the plaintiff is entitled to judgment against the defendant The Turquoise Copper Mining and Smelting Co. corporation, in the sum of \$9,975.00, and for costs. Let judgment be entered accordingly.

Done in open court this 20th day of July A. D. 1905.

FLETCHER M. DOAN, Judge.

Endorsed: No. 3969. In the District Court of the Second Judicial District Cochise County Arizona. William H. McKittrick,

plaintiff, vs. The Turquoise Copper Mining and Smelting Co., corporation, Def't. Decision and findings. Filed Jul-20, 1905. Geo. B. Wilcox, Clerk Dist. County, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for Pl'ff.

In the District Court of the Second Judicial District of the Territory of Arizona in and for Cochise County.

WILLIAM H. MCKITTRICK, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING CO., a Corporation,
Defendant.

Judgment.

In this action the defendant The Turquoise Copper Mining and Smelting Co., a corporation, having been duly and regularly served with summons and a copy of the complaint in this action, personally in Cochise County, and having failed to appear and answer the plaintiff's complaint filed herein, and the legal time for answering

276 having expired, and no answer or demurrer having been filed, and the default of the said defendant The Turquoise

Copper Mining and Smelting Co. corporation, having been duly entered according to law. H. L. Pickett, Esq., appeared as attorney for the plaintiff, and witnesses were sworn and examined and documentary evidence introduced in behalf of the plaintiff, and the cause was submitted to the court for its decision, and after due deliberation, the court files its findings and decision in writing, and orders that judgment be entered herein in favor of the plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that William H. McKittrick, the plaintiff, do have and recover of and from the defendant The Turquoise Copper Mining and Smelting Co. corporation, the sum of nine thousand and nine hundred and seventy five dollars, with interest thereon from the date hereof at the rate of seven per cent per annum until paid, together with the plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$23.45 dollars. And it is further ordered that plaintiff have execution therefor.

Done in open court this 20th day of July A. D. 1905.

FLETCHER M. DOAN, Judge.

Endorsed: No. 3969. District Court Second Judicial District in and for Cochise County, Arizona Territory. William H. McKittrick, Pl'ff, vs. The Turquoise Copper Mining and Smelting Co., corporation, def't. Judgment. Filed Jul-20 1905. Geo. B. Wilcox, Clerk Dist. Court, by Philo Wilcox, Deputy. H. L. Pickett, Att'y for Pl'ff.

277 In the District Court of the Second Judicial District of the
Territory of Arizona, County of Cochise.

W H. MCKITTRICK, Plaintiff,

vs.

TURQUOISE COPPER MINING AND SMELTING Co., a Corporation,
Defendant.

I, the undersigned Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in judgment book 5 of said court, at page 175. And I further certify that the foregoing papers hereto annexed, constitute the judgment roll in said action.

Witness my hand and the seal of the District Court this 20th day of July, 1905.

[SEAL.]

GEO. B. WILCOX, *Clerk.*

By PHILO WILCOX,

Deputy Clerk.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, George B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise, do hereby certify that the within and foregoing is a full, true and correct transcript and copy of the judgment roll in the cause entitled: William H. McKittrick vs. Turquoise Copper Mining and Smelting Company #3969, said judgment roll being composed of the following pleadings and papers, viz.: Complaint, with default thereto attached; summons; findings of fact and conclusions of law; memorandum of costs; reporter's transcript of evidence; judgment and judgment roll cover, together with the endorsements on or upon each one of said pleadings and papers. Given under my hand and the seal of said court hereto attached, this 17th day of December, A. D.

1908, at my office, in the city of Tombstone, county and ter-
278 ritory aforesaid.

[SEAL.]

GEO. B. WILCOX, *Clerk.*

By P. MICHELENA,

Deputy Clerk.

(PLAINTIFFS' EXHIBIT F.)

AUGUST 12TH, 1905.

Received from R. S. Hunt, sheriff, forty-four thousand seven hundred sixty-seven & 20/100 dollars Judgment and interest in re The Western Co. vs. Turquoise Copper Mining and Smelting Co., a corporation.

H. L. PICKETT,

Attorney for Plaintiff,

By CHARLES BOWMAN.

\$44,767.20.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, R. S. Hunt, Sheriff of the county of Cochise, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the 21st day of July, 1905, I did, on the 21st day of July, 1905, levy upon the mines and mining claims hereinafter described and noticed the same for sale as the law directs (by posting written notices of the time and place of sale, particularly describing the property, for three weeks successively in three public places, and also where said property was to be sold, and publishing a copy thereof, daily, Sundays excepted, for the same period in the Tombstone Prospector, a newspaper published in said county of Cochise, and on the 12th day of August, 1905, at 2 o'clock P. M. of said day, in front of the court house door of said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, in separate parcels, and receiving no bids therefor, I then offered the property for sale in one lot or parcel, the property described as follows, to-wit: The Tom Scott U. S. Patented Mine No. 21,788, recorded in book 12, deeds of mines, at page 73.

The Maxon mining claim, located January 1st, 1889, recorded January 22d, 1889, in book 11, records of mines, at page 620.

The Tip Top mining claim, located January 1st, 1889, recorded January 22nd, 1889 in book 11, records of mines at page 620.

The San Juan mining claim, the amended location of which is recorded in book 29, records of mines, at page 468.

The Ann mining claim, the location notice of which is recorded in book 14, at page 485, records of mines.

The Santiago mining claim, the location notice of which is recorded in book 15, records of mines, at page 153, and the amended location of which is recorded in book 25, records of mines, at page 69.

The West Side mining claim, the location notice of which is recorded in book 11, records of mines, at page 243, and the amended location of which is recorded in book 9, records of mines, at page 130.

The Tip Top No. 2 mining claim, the location notice of which is recorded in book 12, records of mines, at page 136.

The Gladys mining claim, the location notice of which is recorded in book 15, records of mines, at page 219.

One-third interest in the Copper Bell mining claim, the location notice of which is recorded in book 19, records of mines, at page 169.

280 One-third interest in the Orange mining claim, the location notice of which is recorded in book 19, records of mines, at page 173.

One-third interest in the Ant mining claim, the location notice of which is recorded in book 19, records of mines, at page 171.

One-third interest in the Kohinoor mining claim, the location notice of which is recorded in book 19, records of mines, at page 168.

One-third interest in the International mining claim, the location notice of which is recorded in book 19, records of mines, at page 170.

All of the foregoing mines and mining claims are of record in the office of the recorder of Cochise county, territory of Arizona, and the references above made are to the books of deeds of mines in said recorder's office, reference to which for a more complete description is hereby made. And sold the whole of the same to the Western Company, a corporation, for the sum of forty-five thousand eight hundred twenty-five & 30/100 — said The Western Company, a corporation, being the highest bidder, and said sum being the highest bid for the same; And I have given said purchaser, the Western Company, a corporation, a certificate of said sale, and have filed a duplicate thereof with the recorder of said county of Cochise, and I herewith return said writ fully satisfied.

And I further certify that I deducted from the said sum of 45,-
825.30, my fees, commissions and expenses, amounting to the
281 sum of 1,058.10, leaving a net balance of \$44,767.20, which

I have paid to plaintiff's attorney, whose receipt therefor is hereto attached.

R. S. HUNT, *Sheriff*.
By C. A. WALLACE,
Deputy Sheriff.

Dated, August 12th, 1905.

In the District Court of the Second Judicial District, Territory of Arizona, in and for Cochise County.

The Territory of Arizona to the Sheriff of the County of Cochise,
Greeting:

Whereas, on the 20th day of July, 1905, The Western Company, a corporation, recovered a judgment in the said District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise against Turquoise Copper Mining and Smelting Co., a corporation, for the sum of forty four thousand & five hundred & forty nine and 43/100 dollars, with interest thereon at the rate of 7 per cent per annum till paid, together with said plaintiff's costs and disbursements at the date of said judgment, amounting to \$21.35, and accruing costs, as appears to us of record. And whereas, the judgment roll in the action in which said judgment was entered is filed in the Clerk's office of said Court, in the said county of Cochise and the said judgment was docketed in said clerk's office in the said county, on the day and year first above written. And the sum of \$44,549.43 with interest and costs is now (at the date of this writ) actually due on said judgment. Now, you, the said sheriff, are hereby required to make the said sum due on the
said judgment, with interest as aforesaid, and costs and accru-
282 ing costs, to satisfy said judgment out of the personal prop-
erty of said debtor, or if sufficient personal property of said
debtor cannot be found, then out of the real property in your county

belonging to the Turquoise Copper Mining & Smelting Co., a corporation on the day whereon said judgment was docketed in said county, or any time thereafter, and make return of this writ within 90 days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. Fletcher M. Doan, Judge of said Second Judicial District of the territory of Arizona, at the court house in said county of Cochise, this 20 day of July, 1905.

Attest my hand and the seal of said court, the day and year last above written.

[SEAL.]

GEO. B. WILCOX, *Clerk*,
By PHILO WILCOX, *Deputy Clerk*.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I hereby certify the annexed and foregoing to be a full, true and correct copy of the execution and the return thereof, in the cause entitled The Western Company, a corporation, plaintiff, vs. Turquoise Copper Mining and Smelting Co., corporation, defendant. Reg. No. 3968 on file in the Clerk's office of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise.

Witness my hand and the seal of said court this 17th day of December, A. D. 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk*.
By P. MICHELENA,
Deputy Clerk.

(PLAINTIFF'S EXHIBIT G.)

AUGUST 12th, 1905.

Received from R. S. Hunt, sheriff, ten thousand forty-two 283 and 40/100 dollars. Judgment and interest in re McKittrick vs. The Turquoise Copper Mining and Smelting Co., a corporation.

H. L. PICKETT,
Attorney for Plaintiff.
By CHARLES BOWMAN,

\$10,042.40.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, R. S. Hunt, sheriff of the county of Cochise, do hereby certify that under and by virtue of the within and hereunto annexed writ of execution, by me received on the 21st day of July, 1905, I did, on the 21st day of July, 1905, levy upon the mines and mining claims hereinafter described, and noticed the same for sale as the law directs (by posting written notices of the time and place of sale, particularly describing the property, for three weeks success-

ively in three public places, and also where said property was to be sold, and publishing a copy thereof, daily, Sundays excepted, for the same period on the Tombstone Prospector, a newspaper published in said county of Cochise, and on the 12th day of August, 1905, at 2 o'clock P. M. of said day, in front of the court house door of said county, the time and place fixed for said sale, I did attend and offered for sale at public auction, in separate parcels, and receiving no bids therefor, I then offered the property for sale in one lot or parcel, the property described as follows, to-wit:

The Tom Scott U. S. patented line No. 21,788, recorded in book 12, deeds of mines, at page 73.

The Maxon mining claim, located January 1st, 1889, recorded January 22d, 1889, in book 11, records of mines, at page 620.

The Tip Top mining claim, located January 1st, 1889, recorded January 22d, 1889, in book 11, records of mines, at page 620.

284 The San Juan mining claim, the amended location of which is recorded in book 29, records of mines, at page 468.

The Ann mining claim, the location notice of which is recorded in book 14, at page 485, records of mines.

The Santiago mining claim, the location notice of which is recorded in book 15, records of mines, at page 153, and the amended location of which is recorded in book 25, records of mines, at page 69.

The West Side mining claim, the location notice of which is recorded in book 11, records of mines, at page 243, and the amended location of which is recorded in book 9, records of mines, at page 130.

The Tip Top No. 2 mining claim, the location notice of which is recorded in book 12, records of mines, at page 163.

The Gladys mining claim, the location notice of which is recorded in book 15, records of mines, at page 219.

One-third interest in the Copper Bell mining claim, the location notice of which is recorded in book 19, records of mines, at page 169.

One-third interest in the Orange mining claim, the location notice of which is recorded in book 19, records of mines, at page 173.

One-third interest in the Ant mining claim, the location notice of which is recorded in book 19, records of mines, at page 171.

One-third interest in the Kohinoor mining claim, the location notice of which is recorded in book 19, records of mines, at page 168.

285 One-third interest in the International mining claim, the location notice of which is recorded in book 19, records of mines, at page 170.

All of the foregoing mines and mining claims are of record in the office of the recorder of Cochise county, territory of Arizona, and the references above made are to the books of deeds of mines, and books of records of mines in said recorder's office, reference to which for a more complete description — hereby made.

And sold the whole of the same to The Western Company, a corporation, assignee of the Judgment creditor, William H. McKittrick, for the sum of ten thousand four hundred and six & no/100

dollars, said The Western Company, a corporation, being the highest bidder and said sum being the highest bid for the same; and I have given said purchaser, The Western Company, a corporation, a certificate of said sale and have filed a duplicate thereof with the recorder of said county of Cochise, and I herewith return said writ fully satisfied.

And I further certify that I deducted from the said sum of -10,406.00 my fees, commissions and expenses, amounting to the sum of -363.60 leaving a net balance of \$10,042.40, which I have paid to Plaintiff's attorney, whose receipt therefor is hereto attached.

R. S. HUNT, *Sheriff*.
By C. A. WALLACE,
Deputy Sheriff.

Dated August 12th, 1905.

In the District Court of the Second Judicial District, Territory of Arizona, in and for Cochise County.

The Territory of Arizona to the Sheriff of the County of Cochise,
Greeting:

Whereas, on the 20th day of July, 1905, William H. Mc-
286 Kittrick recovered a judgment in the said District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise against Turquoise Copper Mining & Smelting Co., a corporation, for the sum of nine thousand nine hundred and seventy-five dollars, with interest thereon at the rate of 7 per cent per annum till paid, together with said plaintiff's costs and disbursements at the date of said judgment amounting to the sum of \$23.45, and accruing costs, as appears to us of record. And whereas the judgment roll in the action in which said judgment was entered is filed in the Clerk's office of said court, in the said county of Cochise and the said judgment was docketed in said Clerk's office in the said county, on the day and year first above written. And the sum of \$9,975.00 with interest and costs is now (at the date of this writ) actually due on said judgment. Now, you, the said sheriff, are hereby required to make the said sum due on the said judgment, with interest as aforesaid, and costs and accruing costs, to satisfy said judgment out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to Turquoise Copper Mining & Smelting Co., on the day whereon said judgment was docketed in said county, or any time thereafter, and make return of this writ within 90 days after your receipt hereof, with what you have done endorsed hereon.

Witness Hon. Fletcher M. Doan, Judge of said Second Judicial District of the Territory of Arizona, at the Court house in said
287 county of Cochise this 20th day of July, 1905.

Attest my hand and the seal of said Court, the day and year last above written.

[SEAL.]

GEO. B. WILCOX, *Clerk*.
By PHILO WILCOX,
Deputy Clerk.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I hereby certify the annexed and foregoing to be a full, true and correct copy of the execution and the return thereof in the cause entitled William H. McKittrick, plaintiff, vs. Turquoise Copper Mining and Smelting Co. a corporation, defendant, Reg. No. 3969 on file in the Clerk's office of the District Court of the Second Judicial District of the Territory of Arizona in and for the county of Cochise.

Witness my hand and the seal of said court this 17th day of December, A. D. 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk.*

By P. MICHELENA,

Deputy Clerk.

(PLAINTIFF'S EXHIBIT II.)

This indenture, made the eleventh day of July in the year of our Lord one thousand nine hundred and six between R. S. Hunt, Sheriff of the county of Cochise, Territory of Arizona, the party of the first part, and the Western Company a corporation organized and existing under and by virtue of the laws of California of County of Kern, state of California, the party of the second part,

Whereas, by virtue of a writ of execution issued out of and under the seal of the United States District Court for the Second Judicial District and County of Cochise, Territory of Arizona, tested the

20th day of July A. D. 1905, upon a judgment recovered in
288 said court on the 20th day of July A. D. 1905, in favor of

The Western Company a corporation, party of the second part and against Turquoise Copper Mining & Smelting Co. corporation to the said sheriff directed and delivered, commanding him that out of the personal property of said judgment debtor in said county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, then he should cause the amount of said judgment to be made out of the real property belonging to said judgment debtor on the 20th day of July A. D. 1905, or at any time afterwards;

And whereas, because sufficient personal property of the said judgment debtor could not be found, whereof the said sheriff could cause to be made the moneys specified in said writ, the said sheriff did, in obedience to said command, levy on, take and *and* seize all the right, title, interest and claim which the said judgment debtor so had to the lands, tenements, real estate and premises hereinafter particularly set forth and described with the appurtenances, and did, on the 12th day of August, A. D. 1905, sell all the right, title, interest and claim of the said judgment debtor in and to the said premises, at public auction, in front of the court house door in the city of Tombstone in said county of Cochise between the hours of nine in the morning and five in the afternoon of that day, namely at 2 o'clock P. M., after having first given due notice of the time

and place of such sale in the Tombstone Prospector & by
289 posting according to law; at which sale all the right, title,
interest and claim of said judgment debtor, in and to the
said premises were struck off and sold to the said party of the
second part, for the sum of forty-five thousand eight hundred and
twenty five 30/100 dollars, lawful money of the United States of
America, the said party of the second part being the highest bidder,
and that being the highest sum bid for the same, whereupon the
said sheriff, after receiving from the said purchaser the said
sum of money so bid as aforesaid, gave to the said party of the second
part such certificate of said sale as by law directed to be given,
and a duplicate of such certificate was duly filed by the said sheriff
in the office of the recorder of the county of Cochise.

And whereas nine months after said sale have expired without
any redemption of the said premises having been made by any
person,

Now, this Indenture Witnesseth, That the said R. S. Hunt, the
sheriff aforesaid, by virtue of the said writ, and in pursuance of the
statute in such case made and provided, for and in consideration
of the said sum of money, to him in hand paid as aforesaid, by
the said party of the second part, the receipt whereof is hereby acknowledged,
has granted, bargained, sold, conveyed and confirmed,
and by these presents does grant, bargain, sell, convey and confirm
unto the said party of the second part, and to its successors and
assigns forever, all the right, title, interest and claim which the
said judgment debtor the Turquoise Copper Mining & Smelt-
290 ing Co. corporation had on the said 20th day of July, A. D.
1905 or at any time afterwards, or now has, in and to all
those certain lots, pieces or parcels of land situate, lying and being
in the said county of Cochise Territory of Arizona, and bounded
and particularly described as follows, to-wit:

All of the following named mining claims situated in the Tur-
quoise Mining District said county and territory, to-wit:

The Tom Scott patented mine recorded in Book 12 deeds of mines
at page 73.

The Maxon mining claim, the location certificate being of record
in the recorder's office of Cochise county in Book 11, record of mines
at page 620.

The Tip Top mining claim recorded in the same book at page 620.

The San Juan mining claim recorded in book 29 of the same
records at page 468.

The Ann mining claim recorded in book 14 of the same records
at page 485.

The Santiago mining claim recorded in book 25 of the same records
at page 69.

The West Side mining claim recorded in book 9 of the same
records at page 130.

The Tip Top No 2 mining claim recorded in book 12 of the same
records at page 136.

The Gladys mining claim recorded in book 15 of the same records
at page 219.

291 An undivided one-third interest in the Copper Bell mining claim recorded in book 19 of the same records at page 169; in the same office.

An undivided one-third in the Orange mining claim recorded in the same book at page 173.

An undivided one-third interest in the Ant mining claim recorded in same book at page 171.

An undivided one-third interest in the Kohinoor mining claim recor-ed in the same book at 168.

An undivided one-third interest in the International mining claim, recorded in the same book at page 170.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold, the said premises, with appurtenances unto said party of the second part its successors and assigns forever, as fully and absolutely as the said sheriff can, may or ought to, by virtue of the said writ, and of the statute in such cases made and provided, grant, bargain, sell, convey and confirm the same.

In witness whereof, the sheriff, the said party of the first part, has hereunto set his hand and seal, the day and year first above written.

R. S. HUNT, [SEAL.]
*Sheriff of the County of Cochise,
Territory of Arizona.*

TERRITORY OF ARIZONA,
County of Cochise, ss:

On this 11th day of July, 1906 personally appeared before me J. E. James, Clerk of Probate Court, the within named R. S. Hunt, sheriff of the county of Cochise, territory of Arizona, known to be to be the person described in and whose name is subscribed to the
292 within instrument, and he acknowledged to me that he, as such sheriff of said county, executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the county of Cochise, Territory of Arizona, the day and year in this certificate first above written.

[SEAL.]

J. E. JAMES,
Probate Clerk.

Filed and recorded at request of Chas. Bowman July 11, A. D. 1906 at 11 A. M. Book 20 Deeds of mines at pages 598, 599, 600 and 601.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for said county do hereby certify that I have compared the annexed and foregoing copy with the original sheriff's deed, from R. S. Hunt, as sheriff of Cochise, Territory of Arizona, to the Western Company, a corporation, filed for record in my office on the 11th day of July A. D. 1906 and recorded in book 20 deeds of mines at pages 598, 599,

600 and 601 and that the same is a full, true and correct copy of said original and of the whole thereof.

Given under my hand and seal of office this 11th day of December A. D. 1908.

[SEAL.]

C. A. McDONALD,
County Recorder.

(PLAINTIFF'S EXHIBIT I.)

Articles of Incorporation of the Tejon Mining Company.

Know all men by these presents: that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the Territory of
293 Arizona, and we hereby certify:

I. That the names of the incorporations are, W. S. Tevis, W. H. McKittrick, F. S. Rice, J. L. Schonenbach, E. D. Buss.

II. That the name of said corporation and by which it shall be known in law is "Tejon Mining Company": That the principal place for the transaction of its business within the territory of Arizona shall be at Gleeson, in Cochise County, Arizona, The General Offices shall be at Bakerfield, Kern County, California, with branch offices at such other places as the board of directors may from time to time direct. Said company may also carry on and transact business of the kind and nature hereinafter provided, in all other states and territories whatsoever.

III. The business ~~proposed~~ to be transacted and carried on by the said corporation is as follows: In general to engage in and carry on the business of mining, refining, smelting and manufacturing any and all kinds of ores, minerals and metals: to purchase, lease or acquire by license, bond, concession, grant, or otherwise, any privileges, machinery, plant or other effects whatsoever which the company may think proper from time to time to be acquired for any of its purposes, including light and power plants, and all patents and patent rights, and licenses thereto appertaining; also to manufacture, buy or sell all kinds of merchandise; to prospect and search for ores and minerals; to develop, mine and grant licenses for mining in and over any land which may be acquired by the company, and to sell and otherwise dispose of lands, mines or
294 other property of the company; to buy, sell, manufacture and deal in minerals, plant machinery, implements, conveniences, provisions and things capable of being used in connection with mining operations or acquired by workmen or others employed by the company; to construct, carry out, improve, manage, work, control and superintend any roads, ways, railways, bridges, reservoirs, water-courses, aqueducts, wharves, furnaces, mills crushing works, hydraulic works, factories, warehouses, and other works and conveniences which may seem directly conducive to any of the objects of the company, and to contribute to, subsidize, or otherwise aid or partake in any of such operations; to purchase, acquire, lease,

own, control, sell, transfer or dispose of water and water rights; ores, minerals, metals, or oils; to buy sell or otherwise dispose of the capital stock of this, or any other corporation, and generally to do any and all acts and things, and transact any and all other business incidental to the purposes aforesaid and not contrary to the laws of the Territory of Arizona, or of the United States of America.

IV. That the amount of the capital stock of the said corporation shall be one million dollars, divided into one million shares of the par value of one dollar each, payable in money, property labor or any other valuable right or thing, and the judgment of the board of directors as to the value thereof shall be conclusive; and furthermore, that the payments on such stock shall be subject to call by the board of directors.

V. That the time of commencement of said corporation shall be immediately on filing these articles with the recorder of the county of Cochise, Arizona, and the auditor of the Territory of Arizona, and such existence shall continue for a period of twenty-five years from and after the date of filing.

VI. That the affairs of said corporation shall be conducted by a board of five directors, who shall be stockholders of the corporation, and shall be elected at the annual meeting of the corporation on the first Wednesday after the first Monday in November, of each year, and on the same date each year thereafter, at the office of the company, in the city of Bakersfield, California, That all stockholders and directors' meetings may be held at its general offices at Bakersfield, California; that the officers of said corporation shall be a President, and a Vice-President (both to be elected by the board of directors from their own number), a secretary, a treasurer, and such other officers as the board of directors may deem necessary.

The members of the board of directors for the current year, and until their successors are chosen and qualified are: W. S. Tevis, Kern County, California, W. H. McKittrick, Kern County, California, F. S. Rice, Bakersfield, California, J. L. Schonenbach, Bakersfield, California, and E. D. Buss, Bakersfield, California.

VII. That the said corporation is not at any time to subject itself to a greater liability than one hundred thousand dollars.

VIII. That the private property of the stockholders of said corporation shall be exempt from liability for corporate debts.

In witness whereof, we have hereunto set our hands and seals this 18th day of July, 1906.

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WILLIAM S. TEVIS.	[SEAL.]
W. H. MCKITTRICK.	[SEAL.]
F. S. RICE.	[SEAL.]
J. L. SCHONENBACK.	[SEAL.]
E. D. BUSS.	[SEAL.]

STATE OF CALIFORNIA,

County of Kern, ss:

On this 18th day of July in the year of our Lord one thousand nine hundred and six before me, A. T. Harrington, a Notary Public

in and for said county and state, residing therein, duly commissioned and sworn, personally appeared William S. Tevis, W. H. McKittrick, F. S. Rice, J. L. Schonenbach, and E. D. Buss, known to me to be the persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the said county of Kern, the day and year in this certificate first above written.

[SEAL.]

A. T. HARRINGTON,
Notary Public in and for the County of Kern,
State of California.

My commission expires May 4, 1907.

Filed and recorded at request of Wm. S. Tevis, Jul- 21, 1906 at 1 P. M. in Book 4 Incorporations, at Pages 93-94-95.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for said county, do hereby certify that I have compared the annexed and foregoing copy with the original articles of incorporation of the "Tejon Mining Company" filed for record in my office on the 21st day of July, 1906; and recorded in book 4 Incorporations at Pages 93-94-95; and that the same is a full, true and correct copy of said original and of the whole thereof.

Witness my hand and seal of office this 28th day of May, A. D. 1908.

[SEAL.]

C. A. McDONALD,
County Recorder.

This indenture made the 20th day of July, in the year of our Lord, one thousand nine hundred and eight. Between The Western Company, a corporation organized under the laws of the State of California, the party of the first part and the Tejon Mining Company, a corporation organized under the laws of the Territory of Arizona, the party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of fifty nine thousand eight hundred dollars, gold coin of the United States of America, to it in hand, paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to its successors and assigns forever; all those certain lots, pieces, or parcels of land, situated in the county of Cochise, Territory of Arizona, formerly belonging to the Tourquoise Copper Mining and Smelting Company, a corporation, and now the property of the party of the first part, and particularly described as follows, as shown by the Cochise County, Arizona, records:

The Tom Scott U. S. Patented mine No. 21788 recorded in book 12, deeds of mines, at page 73.

The Maxon Mining Claim, located Jan. 1, 1889, recorded Jan. 22, 1889 in book 11, record of mines, at page 620.

The Tip Top mining claim, located Jan. 1, 1889, recorded Jan. 22, 1889, in book 11, records of mines, at page 620.

The San Juan Mining Claim, the amended location of which is recorded in book 29, record of mines page 468.

298 The Ann mining claim, the location notice of which is recorded in book 14 at page 485, records of mines.

The Santiago mining claim, the location notice of which is recorded in book 15, record of mines, at page 153 and the amended location of which is recorded in book 25, record of mines at page 69.

The West Side mining claim, the location notice of which is recorded in book 11, record of mines, at page 243 and the amended location of which is recorded in book 9, record of mines, at page 130.

The Tip Top No. 2 mining claim, the location notice of which is recorded in book 12, record of mines, at page 136.

The Gladys mining claim, the location notice of which is recorded in book 15, record of mines, at page 219.

One-third interest in the Copper Belle Mining Claim, the location notice of which is recorded in book 19, record of mines, page 169.

One third interest in the Orange mining claim, the location notice of which is recorded in book 19, record of mines, at page 173.

One third interest in the Ant mining claim, the location notice of which is recorded in book 19, record of mines, at page 171.

One third interest in the Kohinoor mining claim, the location notice of which is recorded in book 19, record of mines, at page 168.

299 One third interest in the International mining claim, the location notice of which is recorded in book, 19, record of mines, at page 170.

Together with all personal property of every description now situate on the premises above described.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever. In witness whereof, the said party of the first part has hereunto set its hand and seal the day and year first above written, by its president and secretary, thereunto duly authorized.

THE WESTERN COMPANY, [SEAL.]
By E. D. BUSS, *President*, [SEAL.]
By FRANK S. RICE, *Secretary*, [SEAL.]

[CORPORATE SEAL.]

STATE OF CALIFORNIA,

County of Kern, ss:

On this 21st day of July in the year one thousand nine hundred and eight, before me A. T. Harrington, a notary public in and for said county and state, residing therein, duly commissioned and sworn, Personally — E. D. Buss and Frank S. Rice known to me to be the president and secretary respectfully of The Western Company, the corporation that executed the within and foregoing instrument, and to be the officer who executed the said instrument on behalf of said corporation, therein named, and acknowledged to me that such corporation executed the same. In witness whereof I, have hereunto set my hand and affixed my official seal, at my office, in the said county of Kern, the day and year in this certificate first above written.

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[SEAL.]

A. T. HARRINGTON,

*Notary Public in and for the county of Kern,**State of California.*

Filed and recorded at the request of Chas. Bowman, July 31st A. D. 1908 at 11:15 A. M. Book 23 deeds of mines at pages 454, 455, 456.

TERRITORY OF ARIZONA,

County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for said county do hereby certify that I have compared the annexed and foregoing copy with the original deed from The Western Company, a corporation, to the Tejon Mining Company, a corporation, filed for record in my office on the 31st day of July, 1908 and recorded in book 23, deeds of mines at pages 454, 455, 456 and that the same is a full, true and correct copy of said original and of the whole thereof.

Given under my hand and seal of office this 11th day of December A. D. 1908.

[SEAL.]

C. A. McDONALD,

County Recorder.

(PLAINTIFF'S EXHIBIT K.)

W. S. Tevis, W. H. McKittrick, and The Western Company, a corporation.

GENTLEMEN: On the 29th day of November, 1902, the undersigned entered into an agreement with W. S. Tevis and W. H. McKittrick, a copy of which contract is enclosed herewith.

This contract has been faithfully carried out by us but has not been observed by Messrs. Tevis and McKittrick. Instead of selling the treasury stock and with the proceeds paying the judgment in said contract mentioned, Messrs. Tevis & McKittrick sold this
301 treasury stock for a mere bagatelle, rendering it impossible to pay off the judgment and instead of paying off the judgment by the sale of stock, Mr. Tevis loaned the Turquoise Copper Mining

& Smelting Company money to pay off the said judgment and took the company's note therefor. This note, it seems, he later transferred to the Western Company and we understand from letters from Messrs. Tevis & McKittrick that the Western Company is owned and controlled by Mr. Tevis.

Messrs. Tevis & McKittrick then allowed the Western Company to obtain a judgment on said note in Cochise County, Arizona, under which judgment the company's property was sold and bid in by the Western Company, who now hold sheriff's deed therefor.

As will be seen, it was agreed that the undersigned should not be liable for any expense connected with the operation of said Turquoise Copper Mining & Smelting Company, except the expense of selling the stock held in trust as therein mentioned. Nevertheless, Messrs. Tevis & McKittrick allowed and caused Mr. McKittrick to obtain a judgment against the company for \$9,998.00 for salary, as secretary of this company, and under the judgment also the company's property has been sold to the Western Company.

Now, two years have elapsed and more and none of the purposes or interest of the contract have been carried out, but on the contrary, Messrs. Tevis & McKittrick have put it out of their power to comply with said contract and we, therefore, demand that as against us, you

302 agree that said Western Company holds all of the property purchased by them under said judgment in trust and that the undersigned own a four-sevenths ($\frac{4}{7}$) interest therein, said interest to be subject to the payment to the Western Company of $\frac{4}{7}$ of the amount paid to liquidate the judgment mentioned in the annexed contract, with interest thereon at the legal rate since said judgment was paid, which payment we offer to make within a reasonable time after offer to convey such $\frac{4}{7}$ interest to us. If you prefer, you can re-convey said property to the Turquoise Copper Mining & Smelting Company and transfer to us enough stock to make us the owner of $\frac{4}{7}$ of the stock in said corporation. In the latter case we will, within ninety days after an election of directors can be held, cause said corporation to pay off said amount paid on said judgment with interest, — or, if you prefer, you can organize another corporation of the same capitalization as said Turquoise Copper Mining & Smelting Co. and convey said property to such new company giving us $\frac{4}{7}$ of the capital stock and a majority of the board of directors and we will, within 90 days thereafter, cause such new company to pay off its said amount paid as aforesaid, to liquidate said judgment with interest.

However, we will, under no circumstances, assume or pay anything on the judgment obtained by Mr. McKittrick for salary or on account of the sale under such judgment.

JEPP RYAN,
THOS. C. RYAN,
By JEPP RYAN,
E. B. RYAN,
By JEPP RYAN.

(PLAINTIFF'S EXHIBIT L.)

BAKERSFIELD CLUB, Jan'y 10, 1903.

Ryan Bros., Leavenworth, Kansas.

DEAR SIR: In order to have everything correct about the new company so we can sell stock and do business with outsiders, it is necessary that you sign the enclosed papers and it would be much better if one of you could come on to the meeting. We can of course do the business by proxy but there are other things we ought to talk over and make our plans about selling stock. Tevis thinks he can send some of the stock to Paris and we would like to know if you could suggest any other place where we could dispose of a block. To make a success of the new company we should all pull together. The enclosed letter from Mr. Bennett explains itself and is quite clear so you cannot make a mistake in signing the papers. Wire me when you receive this and state whether you will come or send proxy to Mr. Rice of the First Nat. Bank.

Yours truly,

W. H. McKITTRICK.

P. S.—Tevis is out of town today.

(PLAINTIFF'S EXHIBIT M.)

BAKERSFIELD, CAL., March 30th, 1903.

Jepp Ryan, Esq., Leavenworth, Kansas.

DEAR RYAN: Yours of the 24th recd. and I note what you say about the \$25,000.00 loan. After receiving the papers from you it only gave us four days to get to Tombstone and make the payment on the property. I found that I could not get the money at the bank without giving personal security, so I got Tevis to advance the money with the understanding that the money
304 was to be returned out of the first sale of stock. (You will see by the minutes of the meeting that that is the way the loan was made.) I have already about twenty some thousand dollars subscribed for but have been waiting to get the papers signed and returned by you all before I issued the stock, and the money will be paid on the note as soon as I get it. Read the papers over carefully and you will see that everything is correct. I send you two copies of the prospectus and you will see that we do not try to deceive anyone but give them the straight truth which is always the best way to do business. I have simply handed the prospectus to a friend and said, read this. Do you want to take a flier with us? We believe it is a good thing to gamble on.

We put the stock at 25c which will give us \$60,000 and I do not think there will be much trouble in selling it if we go to the right people. Return the papers as soon as you can and you had better have a copy made of them for your own information. Lowry is anxious to sink No. 3 shaft but I am not in favor of it until we prospect with the diamond drill.

I will keep you posted and will send the prospectus as soon as we get it out.

Let me know also if you want any of the 240,000 shares at 20c. With regards to all, I am

Yours truly,

W. H. MCKITTRICK.

305 And on the same day, to-wit, the 5th day of August, 1909, came the appellants by their attorneys, and filed in the Clerk's office of said Court, in said entitled cause, certain exhibits, in words and figures following, to-wit:

306 DEF'T'S EX. 1.

Special Meeting of Stockholders.

A special meeting of the stockholders of the Turquoise Copper Mining and Smelting Company, a corporation, was held at the rooms of the First National Bank of Bakersfield, at Bakersfield, California, on the 26th day of January 1903, pursuant to the call and consent in writing of all of the stockholders of said corporation.

The meeting was called to order by Vice President W. H. McKittrick, who presided as Chairman of the meeting in the absence of the president of the corporation.

The Secretary of the corporation not being present at the meeting, on motion of W. S. Tevis seconded by Frank S. Rice and by the unanimous vote of all of the stockholders P. W. Bennett was appointed Secretary of the meeting.

All of the stockholders and stock of the corporation were present at said meeting, either in person or by proxy, as follows to-wit:

W. S. Tevis in person representing 21,417 shares; W. H. McKittrick in person representing 21,417 shares; W. R. Shafter in person representing 100 shares, being embraced in Certificate No. 32 issued to W. H. McKittrick and endorsed by him to W. R. Shafter; Frank S. Rice in person representing 78 shares, being embraced in Certificate No. 32, issued to W. H. McKittrick and endorsed by him to Frank S. Rice; Clinton E. Worden in person, representing 100 shares, being embraced in Certificate No. 32, issued to W. H. McKittrick and endorsed by him to Clinton E.

307 Worden; P. B. Soto by W. H. McKittrick proxy, representing 54 shares; Jepp Ryan by W. H. McKittrick proxy representing 14,278 shares; T. C. Ryan by W. H. McKittrick, proxy representing 27,278 shares; and E. B. Ryan by W. H. McKittrick proxy representing 14,278 shares; and making in the aggregate 100,000 shares, being all of the stock of the corporation.

The Vice President presented to the meeting and caused to be read by the Secretary, the resignation of Jepp Ryan as President and Director of the corporation and also the resignations of T. C. Ryan and E. B. Ryan as Directors of the corporation.

On motion of W. R. Shafter, seconded by W. S. Tevis and by a

unanimous vote of all of the stockholders, all of the said resignations were accepted.

On motion of W. S. Tevis seconded by Frank S. Rice, and by unanimous vote of all the stockholders, it was ordered that the stockholders proceed to elect there directors of the corporation, to fill the vacancies in the Board of Directors, made by the resignations of T. C. Ryan, E. B. Ryan and Jepp Ryan, and that the Secretary of the meeting act as teller in taking the vote of the stockholders for such directors.

The vote of the stockholders for Directors as taken by the teller was as follows:

Each of the following named persons, towit: W. R. Shafter, Frank S. Rice and Clinton E. Worden, received the following vote for Director, towit:

W. S. Tevis, 21,417 shares,
W. H. McKittrick, 21,417 shares.
308 W. R. Shafter 100 shares,
Clinton E. Worden 100 shares,
Frank S. Rice 78 shares,
P. B. Soto 54 shares,
Jepp Ryan 14,278 shares,
E. B. Ryan 14,278 shares,
T. C. Ryan 28,278 shares.

Making in the aggregate 100,000 shares, being a unanimous vote of all of the stock of the corporation.

The vote of all the stockholders of the corporation for W. R. Shafter, Frank S. Rice and Clinton E. Worden, for Directors of said corporation, being unanimous the Chairman declared and announced that said W. R. Shafter, Frank S. Rice and Clinton E. Worden were duly elected as Directors of said corporation to fill the vacancies in the Board of Directors made by the resignations of Jepp Ryan, T. C. Ryan and E. B. Ryan.

On motion of W. S. Tevis, seconded by Frank S. Rice and by a unanimous vote of all of the stockholders of the corporation, the by-laws of the corporation were amended by adding thereto the following as a By-law of said corporation, to be designated Article 16, towit:

Regular meetings of the Board of Directors of this corporation, shall be held at the office of the corporation in the Producers' Savings Bank Building in the City of Bakersfield, Kern County, State of California, on the first Monday of each month at the hour of 3 o'clock P. M., for the transaction of any of the business of the corporation, and such meetings may be adjourned from time to time, as may be necessary to attend to the business of the corporation and no notice of such meetings or adjourned meetings shall be necessary; and a quorum of the Board of Directors being present at any regular or adjourned meeting of the Board shall be competent to transact any business of the corporation; and all acts of the Board of Directors and all business transacted by the Board of Directors at such meetings where a quorum of the Directors are present shall be as valid and binding on said corporation and

on all of the stockholders thereof, as though done by a full Board of Directors, at the principal place of business of the corporation at Willcox, Cochise County, Territory of Arizona.

There being no further business before the meeting, on motion duly passed the meeting of stockholders was adjourned sine die.

W. H. McKITTRICK,
Vice-President.

P. W. BENNETT,
Secretary.

310

Directors' Meeting.

We the undersigned, the Directors of the Turquoise Copper Mining and Smelting Company, a corporation, do hereby give our written consent to the holding of this Special Meeting of the Board of Directors of the said corporation on this 26th day of January 1903; (immediately after the close of the stockholders' meeting), at the rooms of the First National Bank of Bakersfield, in the City of Bakersfield, Kern County, California, for the purpose of organizing the Board of Directors of the corporation, and transacting any other business that may come before the Board.

W. R. SHAFTER,
W. H. McKITTRICK,
WILLIAM S. TEVIS,
FRANK S. RICE,
CLINTON E. WORDEN.

Pursuant to the foregoing consent and the written and telegraphic consent of Directors and Stockholders on file with the said corporation, a special meeting of the Board of Directors of the Turquoise Copper Mining and Smelting Company, a corporation, was held on the 26th day of January 1903, at the Directors' room of the First National Bank of Bakersfield in the Producers' Savings Bank Building, in the City of Bakersfield, Kern County, California, immediately upon the adjournment of the meeting of the stockholders of the corporation at said place.

At which meeting all of the Directors of the said corporation were present.

W. H. McKittrick, presiding as Chairman at said meeting, the former President of said corporation, having resigned, and not being present at said meeting.

The Secretary of the corporation having resigned his office and not being present at the meeting; upon motion duly made and seconded and by a unanimous vote, P. W. Bennett was appointed Secretary pro tem. of the meeting.

The Secretary pro tem. read the minutes of the stockholders' meeting held on said 26th day of January 1903, whereby it appears that W. R. Shafter, Frank S. Rice and Clinton E. Worden, were elected Directors to fill the vacancies in the Board made by the resignations of Jepp Ryan, T. C. Ryan and E. B. Ryan.

The said W. R. Shafter, Frank S. Rice and Clinton E. Worden,

took their seats with W. S. Tevis and W. H. McKittrick as the Board of Directors of the corporation.

The Vice-President presented to the Board the resignation of P. B. Soto as Secretary and Treasurer of the corporation, which resignation was duly accepted by a vote of the Board.

W. H. McKittrick tendered his resignation of the office of Vice President of the corporation to take effect upon the election of a President of the corporation, which resignation was accepted to take effect upon the election of his successor.

W. H. McKittrick the Vice President announced the next business of the meeting to be, the election of the executive officers of
312 the corporation.

On motion of W. S. Tevis, seconded by Frank S. Rice and by the unanimous vote of the other Directors W. R. Shafter, was elected President of the corporation, and immediately occupied the President's Chair and presided at the meeting.

On motion of W. H. McKittrick seconded by Frank S. Rice and by unanimous vote of the other Directors W. S. Tevis was elected Vice President of the corporation.

On motion of W. H. McKittrick seconded by Frank S. Rice and by unanimous vote of the other Directors W. H. McKittrick was elected Secretary of the corporation and immediately entered upon the discharge of his duties as such and superseded P. W. Bennett as Secretary of the meeting.

On motion of W. S. Tevis seconded by Clinton E. Worden and by unanimous vote of the Board of Directors the First National Bank of Bakersfield was appointed Treasurer of the corporation.

On motion of W. S. Tevis, seconded by W. H. McKittrick and by a unanimous vote of the Board of Directors the following resolution was passed and adopted, to-wit:

Whereas an agreement was made on the 29th day of November 1902, by and between W. S. Tevis and W. H. McKittrick, the parties of the first part and Jepp Ryan, T. C. Ryan and E. B. Ryan, parties of the second part a duplicate whereof is on file with the Secretary of this corporation; whereby it is agreed that the parties of the first part are to have the control and management of the said corporation; and whereas the capital stock of the corporation has been changed

313 from its original number of 100,000 shares of the par value of ten dollars each, to 1,000,000 shares of the par value of one dollar each; and whereas by the terms of said agreement, all of the original stock and certificates thereof are to be surrendered to the corporation, and the stock of said corporation is to be disposed of as follows, to-wit: 240,000 shares of the capital stock of the corporation is to be retained and placed in the treasury of the corporation, to be sold in whole or in part by the said W. S. Tevis and W. H. McKittrick, at such prices as may be deemed advisable by the Board of Directors of said corporation for the purpose of raising money to pay the indebtedness of the corporation, and to pay for prospecting the mines of the corporation; and whereas it has been agreed that the parties of the first part shall have 280,500 shares of the capital stock of the corporation, and the parties of the second part shall have

279,500 shares of the capital stock of the corporation; and whereas it has been agreed between said parties that 200,000 shares of said capital stock shall be held by W. H. McKittrick as trustee for said parties of the first and second parts to said agreement, the said stock, or the proceeds thereof to be divided between said parties, in the proportion of 101,000 shares to the parties of the first part and 99,000 shares to the parties of the second part, pursuant to the terms of said agreement, and whereas W. S. Tevis and W. H. McKittrick here present, direct that 100 shares of their portion of said capital stock be transferred and issued to each of the following persons, viz: W. R. Shafter, Frank S. Rice and Clinton E. Worden; and whereas said W. S. Tevis and W. H. McKittrick; state that they are equal
314 owners of all the stock held by them respectively in said corporation:

Now, therefore, it is resolved and ordered by the Board of Directors of said corporation, that upon the surrender to the said corporation of all the outstanding certificates of stock of said corporation; 240,000 shares of the capital stock thereof shall be reserved in the treasury of said corporation; and that new certificates of stock, showing upon their face that the capital stock of the corporation is 1,000,000 dollars, divided into 1,000,000 shares, of the par value of one dollar each, and showing that the said stock is fully paid and forever non-assessable, shall be issued as follows: 139,750 shares to T. C. Ryan; 69,875 shares to E. B. Ryan; 69,875 shares to Jepp Ryan; 100 shares to W. R. Shafter; 100 shares to Frank S. Rice; 100 shares to Clinton E. Worden; 140,100 shares to W. S. Tevis; 140,100 shares to W. H. McKittrick; and 200,000 shares to W. H. McKittrick, Trustee.

On motion of W. S. Tevis, seconded by W. H. McKittrick and by a unanimous vote of the Board of Directors, it was ordered that said W. S. Tevis and W. H. McKittrick may offer for sale and sell, at not less than twenty cents per share, the whole or any part of the 240,000 shares of the treasury stock of said corporation, and that upon payment therefor to the corporation the President and Secretary shall issue to purchasers, certificates of stock for the shares of stock purchased by them, showing upon their face, that the capital stock of the corporation is 1,000,000 dollars, divided into 1,000,000 shares, of the par value of one dollar each, and the said stock
315 is fully paid and forever non-assessable.

On motion of W. S. Tevis, seconded by W. H. McKittrick and by a unanimous vote of the Board of Directors, it is ordered that the following by-law of the corporation, adopted at the stockholders' meeting of said corporation, held this day, be and the same is adopted as one of the by-laws of this corporation to wit:

Regular meetings of the Board of Directors of this corporation shall be held at the office of the corporation, in the Producers Savings Bank Building, in the city of Bakersfield, Kern County, State of California, on the first Monday of each month, at 3 o'clock P. M., for the transaction of any of the business of the corporation, and such meetings may be adjourned from time to time, as may be necessary to attend to the business of the corporation, and no notice

of such meetings or adjourned meetings shall be necessary, and a quorum of the Board of Directors being present at any regular or adjourned meeting of the Board shall be competent to transact any business of the corporation; and all acts of the Board of Directors, and all business transacted by the Board of Directors, at such meetings, where a quorum of the Directors are present, shall be as valid and binding on said corporation, and all of the Stockholders thereof as though done by a full Board of Directors, at the principal office of the corporation, at Willecox, Cochise County Territory of Arizona. And it was further ordered that the said by-law be designated Article 16; and that the said by-law and also the by-law adopted at the stockholders' meeting, held at the principal office of the corporation on October 21st, 1901, providing for the
316 filling of vacancies in the Board of Directors, which is hereby designated as Article 15; be entered in the book of by-laws and authenticated by the signatures of the Directors of the corporation.

On motion of W. H. McKittrick seconded by W. S. Tevis and by a unanimous vote of the Board of Directors, the principal office of the corporation in the State of California is fixed and established in the Producers Savings Bank Building in the City of Bakersfield, Kern County, California.

On motion of W. S. Tevis, seconded by Frank S. Rice and by a unanimous vote of the Board of Directors, it is ordered that the Secretary procure for the use of the corporation, a new book of certificates of stock, such certificates to be in the usual form and show upon their face, that the corporation is organized under the laws of the Territory of Arizona, with its principal office at Willecox, Cochise County, Arizona, and its principal office in California, at Bakersfield Kern County California; that its capital stock is 1,000,000 dollars divided into 1,000,000 shares of the par value of one dollar each; and that the said stock is fully paid, and forever non-assessable, and that said stock is transferable only on the books of the corporation, by the holder thereof in person or by attorney, upon the surrender of the certificate properly endorsed.

On motion of Frank S. Rice, seconded by W. S. Tevis, P. B. Soto, a bona fide resident of the Territory of Arizona, who has been a bona fide resident of such Territory for at least three years, and now is a bona fide resident of Willecox, Cochise County, Arizona,
317 was by a unanimous vote of the Board of Directors, appointed as the agent of this corporation in the Territory of Arizona upon whom all notices and processes, including service of summons on said corporation may be served.

On motion of Frank S. Rice, seconded by Clinton E. Worden and by a unanimous vote of the Board of Directors, it is ordered that W. S. Tevis, the Vice President and W. H. McKittrick the Secretary of said corporation, or either of them be, and they are and each and either of them is hereby authorized and directed to redeem the mining claim and property of the corporation from a sale thereof made by the sheriff of Cochise County, Arizona to one T. B. McPherson, the amount required to make such redemption being the sum of \$25,-

532.42, or thereabout; and for the purpose of making such redemption and raising money to pay the necessary expenses thereof and the other indebtedness and running expenses of the corporation, W. R. Shafter, president and W. H. McKittrick Secretary, are hereby authorized to negotiate a loan to this corporation for a sum not exceeding thirty thousand dollars, for such period of time and at such rate of interest as may be necessary to secure such loan, and they are hereby authorized and directed to execute on behalf of the corporation and under its seal, a promissory note to the person or corporation making such loan, for the payment of the sum so borrowed by them for this corporation, with interest as agreed upon by them and payable at the time agreed upon by them; and it is further ordered that the said promissory note, together with the interest thereon shall be paid out of the first moneys arising
318 from the sales of the 240,000 shares of the treasury stock of said corporation.

On motion of W. H. McKittrick seconded by Frank S. Rice, and by a unanimous vote of the Board of Directors the report of P. B. Soto as Secretary and Treasurer of the corporation was approved, and it was ordered that the balance of account of \$546.21 due to Soto Brothers as shown by said report, from said corporation be paid to them as soon as funds are obtained by the corporation to pay the same.

On motion of Frank S. Rice seconded by W. S. Tevis and by a unanimous vote of the Board of Directors, W. H. McKittrick was appointed General Manager of this corporation.

There being no further business before the Board on motion duly made and carried the meeting was adjourned, since die.

WM. R. SHAFTER, *President*.

W. H. MCKITTRICK, *Sec'y*.

Whereas a special meeting of all of the stockholders of the Turquoise Copper Mining and Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, was held at the rooms of the First National Bank of Bakersfield, at the City of Bakersfield, Kern County, State of California on the 26th day of January 1903; and whereas a special meeting of the Board of

Directors of said corporation was held at the rooms of the
319 First National Bank of Bakersfield, at the City of Bakersfield,

Kern County, State of California, on said 26th day of January 1903; and whereas said meetings were held by consent of all of the stockholders and all of the directors of said corporation, and such consent is in part evidenced only by telegrams and informally; and whereas a certified copy of all of the proceedings of said meetings of stockholders and directors is hereto attached; and whereas we desire to cure all informality in the evidence of the consent of the stockholders and directors of said meetings and to make valid the holding of said meetings at the time and place aforesaid; and to validate and ratify all of the acts and proceedings of the stockholders and directors of said corporation at such meetings, as shown by the said certified copy of the minutes thereof:

Now therefore, we the undersigned stockholders of the Turquoise Copper Mining and Smelting Company, towit: W. S. Tevis, holding 21,417 shares; W. H. McKittrick holding 21,417 shares; W. R. Shafter holding 100 shares; Frank S. Rice holding 78 shares; Clinton E. Worden holding 100 shares; P. B. Soto holding 54 shares; Jepp Ryan holding 14278 shares; T. C. Ryan holding 28,278 shares and E. B. Ryan holding 14278 shares; of the capital stock of said corporation; being all of the capital stock thereof; do hereby ratify and confirm and declare valid the holding of the said special meeting of the stockholders of said corporation; and also the holding of said special meeting of the Board of Directors of said corporation, on the said 26th day of January 1903, at the rooms of the First

320 National Bank of Bakersfield, in the City of Bakersfield as aforesaid; and do hereby ratify and confirm and declare valid all the proceedings of the said stockholders' and directors' meetings as shown by said foregoing certified copy of the minutes of said meetings; and all of the acts of the stockholders and directors of said corporation as shown by said certified copy of the minutes of said meetings; and we hereby agree and declare that all of the acts of the said stockholders and directors, and all of the proceedings of said meetings as shown by said certified copy of minutes, are and shall forever be as valid and binding on us and each of us, as if done at regular stockholders' and directors' meetings, held upon due notice, at the principal place of business of the corporation at Wilcox, Cochise County, Territory of Arizona.

In Witness whereof we have hereunto set our hands this — day of February 1903.

W. H. MCKITTRICK,
JEPP RYAN,
THOMAS C. RYAN,
E. B. RYAN,

STATE OF CALIFORNIA,

County of Kern, ss:

I, W. H. McKittrick Secretary of the Turquoise Copper Mining and Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, do hereby certify the foregoing to be a full true and correct copy of the proceedings of the 321 stockholders of said corporation, at a special stockholders' meeting of said corporation held at the rooms of the First National Bank of Bakersfield, in the City of Bakersfield, Kern County, State of California, on the 26th day of January 1903; and also a full true and correct copy of the proceedings of the special meeting of the Board of Directors of said corporation, held at the rooms of the First National Bank of Bakersfield, in the City of Bakersfield, Kern County, California on the said 26th day of January 1903, as the same appear of record in the Minute Book of said corporation, now in my custody and possession as Secretary of said corporation.

In witness whereof I have hereunto set my hand as Secretary of said corporation, and affixed the seal of said corporation at Bakers-

field, Kern County, State of California, this 17th day of February 1903.

[SEAL.]

W. H. McKITTRICK,
*Secretary of Turquoise Copper Mining
and Smelting Company.*

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DEF'TS' EX. 2.

LEAVENWORTH, KANSAS, April 4, 1903.

Capt. W. H. McKittrick, Bakersfield, Cal.

DEAR CAPT.: Your favor of late date at hand containing the prospectus which is certainly one of the neatest and most attractive I ever saw, and the language of it is expressed in the most honorable way I ever saw a prospectus issued.

I enclose with this the contracts duly signed, although it is not exactly what I might wish, but having the most implicit confidence in you, I have signed the same and hope that it will be satisfactory. I have no doubt but what you will strike a rich body of ore with the drill in a short time, at least I hope so, because I have great confidence in that property and almost know that there is a big body of ore for some one, and not only for my sake but also for yours. I hope that you will be fortunate enough to strike the same.

I remain,

Yours truly,

JEPP RYAN.

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DEF'TS' EX. 3.

Form 1548.

Registry return receipt Sent ——— —, 190—.

Reg. No. 1692 from Post office at Bakersfield, Kern Co. Cal.

Reg. Letter Addressed to T. C. Ryan, Leavenworth, Kans.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

5-9-04.

Received the above described registered { parcel.
letter.

(Sender's name on other side.)

T. C. RYAN.

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

Erase letter or parcel according to which is sent.

(Reverse Side of Card.)

When the registered letter or parcel accompanying this card is delivered the Postmaster will require the signature to the receipt on

the other side, also on his record of registered delivery and mail this card without cover to address below. A penalty of \$300 is fixed by law for using this card for other than official business.

BLUE MOUND, KANS., *May 10, 10 a. m., 1904.*

Post Office Department.

Official business.

Post office at —.

Return to:

Name of Sender, W. H. McKittrick.

Street and Number, or Post Office Box.

Post Office at Bakersfield, Kern Co., Cal.

County of —, State of —.

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DEF'TS' EX. 4.

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

LEAVENWORTH, KANS., *Apr. 12, 5:30 p. m., 1904.*

Post Office Department.

Official Business.

Penalty of \$300 for private use.

Return to:

Name of Sender, W. H. McKittrick.

Street and Number, or Post Office box, Bakersfield, California.

(Reverse side of card.)

STATION K, SAN FRANCISCO, CAL.

Registry Return Receipt.

31596.

Received from the Postmaster at Leavenworth, Kans. (Delivering office), Registered Letter No. 19193 from Post Office at San Francisco, Cal.

Addressed to E. B. Ryan.

(Name of addressee.)

Date Apr'l 12, 1904.

(Date of delivery.)

E. B. RYAN.

(Signature of name of addressee.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order. When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

Received Bakersfield, Cal., Apr. 13, 3 P. —.

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DEF'TS' EX. 5.

LEAVENWORTH, KAN., *March 25, 1904.*

W. H. McKittrick, c/o First National Bank of Bakersfield, Bakersfield, Cal.

MY DEAR SIR: I have your favor of the 14th inst., and note what you say in the matter. I received your telegram of February 19, but, was at a loss to know what to say, and hence did not answer.

I am frank to say to you that I do not quite understand the situation. I have considered that myself and my two brothers, T. C. and E. B. Ryan, were bound by the terms of the written contract, entered into between Mr. Tevis, yourself, and the three Ryans, dated the 29th day of November, 1902, which among other things provides:

"That the capital stock of said corporation shall be changed from its original capitalization to One Million shares of the par value of One dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the Treasury of said Company to be sold in the whole or in part by the said parties of the first part, (W. S. Tevis and W. H. McKittrick) at such price or prices as the Board of Directors of said Corporation may deem advisable."

Under other provisions of the said contract, the Ryans resigned as directors, and a new Board was elected such as you desired, and under the circumstances, and in the light of this Contract, I have not considered that we had much if anything, to say as to the disposition of these 240,000 shares, of the capital stock.

I have practically had no advices as to what has been accomplished in the development of the property since this contract was entered into, excepting such information as I have received from you, but, my impression has been, from your letters, that the property has showed up in such a way as to justify considerable development, and almost certainly assure good results. Your letter, however, would indicate, that such is not the case, in view of the fact that you are now offering to sell the treasury stock at ten cents a share, or even less. My affairs are such, by reason of being engaged in other enterprises, that I am not in shape to purchase any part of this treasury stock, and if I were so disposed, and felt that I had the money to put into it, the tone of your letter is such that I would not feel justified in so doing. I have believed all along and still believe that the property is a good one, and

that we ought to realize good results out of it, but there certainly is no encouragement in your letter, and you have had the control and charge of this property for about one year and — half.

It is and will be my aim and purpose, and I not only speak for myself but for my two brothers, to live up to the terms of our contract with you, and as no one of us is a member of the Board of Directors, I do not feel disposed to dictate or even suggest what you shall do or ought to do, in relation to the sale of the treasury stock, or as to the conduct of the affairs of the Company. I want to act in perfect good faith with you and I have no reason to believe that Mr. Tevis and yourself are not and will not act in perfect good faith with us, and for these reasons I am disposed to leave this matter entirely with you, and the Board of Directors of the Company, believing as I do that no unfair advantage will be taken of us, and that so far as possible our contract with you will be carried out to the letter.

I am not advised as to the actual condition of the property; I do not know just what has been done in the way of prospecting or development; I do not know just what amount of stock has been sold, or what the proceeds of such sales amount to, and you have not advised me as to the amount of money expended in the development of the property.

I would be glad to hear from you in these matters. You can rely on me to do the fair thing in all our business relations. Please let me hear from you.

Respectfully yours,

JEPP RYAN.

DEF'TS' Ex. 6.

LOS ANGELES, 4 28, 1905.

Capt. W. H. McKittrick, Bakersfield, Calif.

DEAR SIR: Your two favors at hand. Your first and second received day apart. I came in the 25th and received your first then this A. M. the 2nd stating that the Bank or some one was going to sue on the 20th and as I was so late receiving the above letters I could not see what benefit I could gain by seeing Mr. Tevis or yourself and as I must go back to camp today I can hardly get to see Mr. Tevis before his departure. Where are you bringing suit- my address will be Banning Calif.

Yours truly,

JEPP RYAN.

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DEF'TS' Ex. 7.

LOS ANGELES, CAL., Sept. 30, 1904.

Capt. W. H. McKittrick, Bakersfield, Cal.

DEAR CAPT.: Your letters with notice of your stock holders meeting were forwarded from Leavenworth to me here. I have been here all summer. Will leave on the 3rd ult. for Kansas and return about 1st of Nov.

Yours truly,

JEPP RYAN.

DEF'TS' EX. 8.

SAN FRANCISCO, CALIFORNIA, June 13, 1908.

Messrs. Jepp Ryan, T. C. Ryan and E. B. Ryan, Leavenworth,
Kansas.

GENTLEMEN: As we have advised you from time to time, the Turquoise Copper Mining and Smelting Company was obliged to borrow from The Western Company, a California corporation, at different times sums of money aggregating, in all, the total of \$39,303.33 principal and \$4,567.97 interest, on the 24th day of last May. The Western Company has frequently demanded of the mining company the repayment of these funds. We have kept you advised of this condition of affairs, and have asked you to join us in meeting this indebtedness, but up to date have received no favorable reply.

329 On the 24th day of May, above mentioned, The Western Company secured judgment against the Turquoise Copper Mining and Smelting Company in the sum of \$39,303.33 principal; \$4,567.97 interest; \$200.00 attorney's fee and \$6.75 costs of suit, together with interest on all of said sums at the rate of seven (7) per cent per annum from date until paid.

The natural consequence is that the property of the mining company will, in the near future, be sold to the highest bidder to satisfy this judgment.

It is the purpose of this letter to advise you that The Western Company, from whom the mining company borrowed the funds above mentioned, is practically controlled by Mr. Tevis, whose family own all of its stock. Through his influence we have succeeded in staying execution under this judgment long enough to give me the opportunity of asking each of you to join me in one last effort to save the property by contributing your proportion of the amount necessary to repay The Western Company, to-wit:

Jepp Ryan.....	69,875 shares;
T. C. Ryan.....	139,750 shares;
E. B. Ryan.....	69,875 shares,
and	99,000 shares.
held in trust by me for the Ryan Brothers.	

Total	378,500 shares
-------------	----------------

It is proposed, therefore, to levy an assessment (which of course, will have to be voluntary,) of five (5) cents per share upon the stock of the corporation, which will give us \$50,000.00 with which to meet the indebtedness to The Western Company and have a sufficient sum in the treasury for our immediate necessities.

I have submitted this proposition to the California stockholders, and they have all consented to stand this assessment.

You will realize that we must act promptly in this matter. Should

you decide that you are not willing to pay your pro rata, there is nothing left for us to do but to permit the property to be sold to pay the debt.

I hope you will give this matter serious consideration and wire me immediately upon receipt of this letter, what action you will take in the premises.

Yours very truly,

W. H. McKITTRICK,

Sect. T. C. M. & S. Co.

NOTE:—Copy of the foregoing letter was sent, by Registered Mail on June 13, 1905, from San Francisco, Cal., to each of the three Ryans addressed thereby, under separate cover. Also a carbon copy of same letter was sent to the First National Bank, Leavenworth, Kansas, bearing foot note viz:—

First National Bank, Leavenworth, Kansas.

MY DEAR MR. WILSON: I have this day mailed copies of the above letter to Messrs. Jepp, T. C. and A. B. Ryan. You will notice

331 The Western Company has already secured judgment against us in the sums named. We have no time to loose, and unless

the Bank or the Ryans act promptly, the property will be lost to the present company. I have no intention myself of sacrificing my interest in this property. Mr. Tevis and I have agreed to put up our share, as have also all of the other California stockholders. We do not intend, however, to redeem the property for the benefit of those who are not willing to stand their part of the expense of redeeming and running the property; preferring to permit it to be sold for the debt and trust to our ability to purchase it from The Western Company, should they become possessed of it under the execution of this judgment.

DEF'T's EX. 9.

LOS ANGELES, CAL., *July 11, 1905.*

Capt. W. H. McKittrick, R'm 1013 Mutual Savings Bank Bldg., San Francisco, Cal.

DEAR CAPTAIN: Your letter of the 13th ult., has just been received by me, having been forwarded to me from Leavenworth, Kansas, where it was sent by you. Now, in regard to the matter of the voluntary assessment on this stock, will say, that I cannot answer for the stock until I can get in touch with the parties in Leavenworth; but I will be able to give you a reply in regard to this matter

332 on or about the 1st of September, as I shall be in connection with the Leavenworth parties by or before that time. Now, if you can hold Mr. Tevis and his company off until that time, say about the fore part or middle of September, I will be able to give you some kind of an answer one way or the other.

In your letter you say that on the 24th of May, the Western Company secured a judgment against the Turquoise Copper Mining

& Smelting Company, but you do not say where this judgment was recovered, whether in California or in Arizona. Also kindly give me some more definite idea, if you can, regarding the matter of this indebtedness, to-wit: the \$39,303 which you note is principal. How was this indebtedness incurred? Was it through the company note given for moneys advanced for development of the properties, or how? Kindly answer all these questions so that I will be in a position to talk intelligently when I get in touch with the Leavenworth parties, for they will undoubtedly want to know all the whys and wherefores. Answer me if you will at your earliest possible convenience, addressing your communication to me at Banning, California, where I am now located.

Thanking you for your previous favor, and trusting you may be able to arrange this matter as hereinbefore suggested, I remain,

Very respectfully,

JEPP RYAN.

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DEF'TS' EX. 10.

Registry Return Receipt.

Received from the Postmaster at Leavenworth, Kans.
Registered Letter. No. 7349.

From Post Office at San Francisco, Cal.

Addressed to Mr. Jepp Ryan. 25733.

Date 9, 4, 1905.

JEPP RYAN.

(Signature of name of addressee.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

(Reverse Side of Card.)

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

Forwarded Los Angeles, Cal. Station C. Oct. 4, 6:30 P. M. '05.

Post Office Department.

Official business.

Penalty of \$300 for private use.

Name of Sender, W. H. McKittrick.

Street and Number, or Post Office Box, 2535 Pac. Ave. San Francisco, California.

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DEF'TS' EX. 11.

Registry Return Receipt.

Received from the Postmaster at Leavenworth, Kan. Registered Letter No. — from Post office at San Francisco, Cal. Addressed to Mr. E. B. Ryan.

Date Oct. 5, 1905.

E. B. RYAN

(Signature of name of addressee.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

(Reverse Side of Card.)

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.
Billings, Mont., Oct. 5, 11:30 A. M., 1905.
7350.

Post Office Department.
Official Business.

Penalty of \$300 for private use.

Return to:

Name of Sender, W. H. McKittrick.

Street and Number, or Post Office Box, 2525 Pacific Ave., San Francisco, California.

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DEF'TS' EX. 12.

Registry Return Receipt.

Received from the Postmaster at Leavenworth, Kan. Registered Letter No. 7351, from Post Office at San Francisco, Cal., Addressed to Mr. T. C. Ryan.

Date Sept. 30, 1905.

(Date of Delivery.)

T. C. RYAN.

(Signature of name of addressee.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A registered article must not be delivered to any one but the addressee, except upon addressee's written order.

When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

Blue-, Kans., Sep. 30, 4 P. M., 1905.

(Reverse Side of Card.)

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

Post Office Department.

Official Business.

Penalty of \$300 for private use.

Returned to:

Name of Sender, W. H. McKittrick.

Street and Number, or Post Office Box, 2525 Pac. Ave., San Francisco, California.

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DEF'TS' Ex. 13.

Special Meeting of the Stockholders of the Turquoise Copper Mining and Smelting Company, Held in the Rooms of the First National Bank Building, Bakersfield, California, January 26th, 1906.

Due notice of this Special Meeting of the Stockholders of the Turquoise Copper Mining and Smelting Company was given according to Article IV, Section III, being published three times a week for two weeks in a daily newspaper in the city of Tombstone, Arizona, known as The Tombstone Prospector.

Notice also given by registered mail to Jepp Ryan, E. B. Ryan and T. C. Ryan. All the other stockholders were personally notified by Wm. H. McKittrick, Secretary of the company.

Meeting called to order by President Wm. R. Shafter.

Stockholders present:

W. R. Shafter	in person, representing	100	shares;
W. S. Tevis	" " " " " " " "	140,100	"
F. S. Rice	" " " " " " " "	100	"
W. H. McKittrick	" " " " " " " "	160,000	"
J. M. Keith, by proxy W. S. Tevis	" " " " " " " "	10,000	"
J. M. Quay, " " " " " " " "	" " " " " " " "	2,000	"
C. E. Worden " " " " " " " "	" " " " " " " "	100	"
H. A. Jastro " " " " " " " "	" " " " " " " "	208,000	"
Wm. H. McKittrick, Trustee for W. S. Tevis and			
W. H. McKittrick, representing		101,000	"
		<hr/> 621,500	"

337 representing 621,500 shares of the capital stock of the Turquoise Copper Mining and Smelting Company.

Wm. H. McKittrick, General Manager of the company, then made a report on the company affairs from October 5th, 1904, to date.

W. H. McKittrick, Secretary of the company, made a full report and also of the finances of the company since October 5th, 1904, to date.

The report from the First National Bank, Treasurer of the company, was then made.

The Secretary read the minutes of all of the Directors' meetings of the Turquoise Copper Mining and Smelting Company, which show plainly the existing condition of the affairs of the company; and he also stated that this special meeting of the Stockholders of the Turquoise Copper Mining and Smelting Company was called to devise some way to pay the debts of the company and to redeem the property from the Sheriff's sale; that the stockholders at this meeting representing 621,500 shares of the Turquoise Copper Mining and Smelting Company, and that all were willing to stand a voluntary assessment of six (6) cents per share on this stock if Jepp Ryan, T. C. Ryan and E. B. Ryan (who are the minority stockholders) would also pay a voluntary assessment on their stock of six (6) cents per share. That it was a great disappointment to all of the stockholders present that Jepp Ryan, T. C. Ryan and E. B. Ryan were not present or represented by proxy, and that it was also a fact that none of the officials of the Turquoise Copper Mining and Smelting Company had ever heard from Jepp Ryan, E. B.

338 Ryan or T. C. Ryan directly or indirectly for several months, and that the registered letters had never been answered, although the registered cards had been returned bearing their signatures.

W. S. Tevis then stated that every effort had been made by the Board of Directors of the Turquoise Copper Mining and Smelting Company to keep this company in existence, and that the stockholders had until February 12th, 1906, to redeem the property.

On motion of F. S. Rice, seconded by W. S. Tevis, the Secretary was instructed to send by registered mail a copy of the minutes of this meeting to Jepp Ryan, E. B. Ryan and T. C. Ryan.

On motion of F. S. Rice, seconded by W. S. Tevis, and by the unanimous vote of all of the stockholders present and represented, all of the official acts of the President, Vice-President, Secretary, Treasurer, General Manager and the Board of Directors, and all of the minutes of previous meetings of Stockholders and Board of Directors were approved and stand approved by a vote of 621,500 shares of stock, representing a majority of the capital stock of the Turquoise Copper Mining and Smelting Company, as follows:

W. H. McKittrick	in person, representing..	160,100	shares;
J. M. Keith, by proxy	W. S. Tevis	" .. 10,000	"
J. M. Quay, " " " " "	" ..	2,000	"
C. E. Worden " " " " "	" ..	100	"
H. A. Jastro " " " " "	" ..	208,000	"

	W. R. Shafter in person, representing.....	100	"
	F. S. Rice " " "	100	"
	W. S. Tevis in person, representing.....	140,100	shares;
339	Wm. H. McKittrick, Trustee for W. H. Mc- Kittrick and W. S. Tevis representing...	101,000	"
		<hr/>	
		621,500	"

On motion of F. S. Rice, seconded by W. S. Tevis, the meeting of the Stockholders of the Turquoise Copper Mining and Smelting Company was adjourned, sine die.

(Signed)

WM. R. SILAFTER, *President*.

(Signed)

W. H. McKITTRICK, *Secretary*.

DEF'TS' EX. 14.

BAKERSFIELD, CAL., *June 7, /04.*

Jepp Ryan, Esq., Leavenworth, Kansas.

DEAR SIR: I met Mr. Wilson and the enclosed letter explains itself.

Only two bids were received for the 208,000 shares of treasury stock. One for $\frac{1}{2}\epsilon$ per share and the other for $\frac{3}{4}\epsilon$ per share. We are disappointed that it did not bring more money and that the bank people did not put in a bid. The Company owe \$35,000.00 and we are putting the payment off day by day but something will have to be done immediately to prevent foreclosure. It will have to go by sheriff's sale to the highest bidder or we will have to put up $3\frac{1}{2}\epsilon$ per share and pay every dollar we owe, then make a new start free from debt. It would be the worst thing that could happen to your interests to have the property sold because the company would be wiped out of existence and we would have nothing 340 to show for what we have put in.

Tevis and I will put up our assessment. Jastro and the others here will put up and Mr. Wilson said his bank people would put up, so all you would have to pay is your assessment on your 99,000 shares that I hold in trust. I believe that some kind of an arrangement could be made to advance your assessment money on your stock if it is not convenient for you to pay at this time.

Now Jepp this is the only way I can see where we will ever be able to pull out because if we ever get a mine we are all right.

To protect your interests we want the bank people to guarantee to give you back your stock when they get their money out. We have fulfilled our contract with you to the letter of the law and with this new deal you are better off than before. Have a talk with Mr. Wilson and let me hear from you at once so it can be arranged before they get judgment on us and sell the property.

With best regards

Yours truly,

W. H. McKITTRICK.

BAKERSFIELD, CAL., June 7/04.

Mr. Wilson, Cashier First National Bank, Leavenworth, Kansas.

DEAR SIR: Mr. Jastro who bought from the Turquoise Copper M. & S. Co. 208,000 shares of treasury stock refused to sell for less than 5¢ per share, says, he bought it to speculate on and would rather pay an assessment of 3½¢ per share than sell. Mr. Jastro saw the Copper Belle Mine when it had a large body of ore and is willing to take a gamble on our stock.

During our talk you did not seem to be very well informed about our company so I will write you fully.

The company own the following claims, Tip Top, Tom Scott, Maxon, San Juan, Santiago, Ann, Tip Top No. 12 and West Side, for which we paid something over \$70,000.00. The company also had a bond on the Gleeson claim but the bond expired long before we made the contract with the Ryan Bros. or organized the new company. About all of the money and development work was put in on this Gleeson claim which proved to be worthless for there was very little ore found and it was too poor in grade to hoist to the surface.

The ore in the old silver mine on the Tom Scott claim would not pay to take out unless there was a smelter on the spot. All the copper on this claim at the Grizzley and Blowout was shipped and there is not a trace to show where it came from. A shaft was put
342 down 300 feet on the Maxon claim but only one stringer of ore two inches wide was struck. A diamond drill hole was put down 756 feet on the Maxon claim and only a few small stringers of sulphide of iron were struck and they carried no copper values.

Of course this shaft and drill hole do not demonstrate the fact that there is no ore on the claim, only it is disheartening and so much money was spent on the Gleeson claim (just over the line) that Mr. Tevis and I have made up our minds not to risk any more on development work.

I will explain how the company owe so much money. The Ryan Bros. refused to pay their share on the final payment to Bryant for his claims. Judgment was given for about \$26,000.00 (other debts were about \$2,000.00) and the sale of the mine was made by the sheriff. Jepp Ryan who was the President of the company had his friend McPherson bid it in and you can see how it left Mr. Tevis and me.

In the meantime the Ryans lost faith in McPherson's good intention, so they came to us with the proposition of giving us the control. When we got the papers signed by the Ryans it only gave me three days to get to Tombstone and redeem the property. We have fulfilled our contract with the Ryan Bros. and we are disappointed that the stock could not be sold for more money but it was out of the question with the contract and large debt hanging over the company. All of the treasury stock has been sold and the com-

pany still owe about \$35,000.00. A demand has been made for immediate payment on the notes of the company so we are left with one of two things to do.

Let the property go to the highest bidder at a sheriff's sale or have an assessment made of $3\frac{1}{2}\text{¢}$ per share on all of the stock (1,000,000) which would put the company out of debt.

We could then increase the capital stock to 2,000,000 shares and put 1,000,000 in the treasury.

Then let every one take off their coats and go to work selling stock, with the guarantee to all buyers that the money would be expended in the development of the property and not into the pocket of the promoters.

I am sure that if our company were out of debt there would not be any trouble in placing the stock.

We have a good undeveloped property, with big surface showings and with the Copper Belle Co. only a few feet away we ought to find a mine if it is on our property. No one is sicker of this mining business than we are and to make the assessment of $3\frac{1}{2}\text{¢}$ is the only way out of it and let the other people who want to speculate put in the money to develop the property. We want to stay with the Ryan Bros. and help them out in every way possible and will you guarantee to return to them the stock when you get your money out? I am going to the mine this month and you ought to send a man down to look the property over with me.

Yours truly,

W. H. McKITTRICK.

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DEF'TS' EX. 16.

BAKERSFIELD, CAL., *January 26, 1903.*

\$30,000.00.

One year after date for value received the Turquoise Copper Mining and Smelting Company, a corporation, hereby promises to pay to William S. Tevis or order, in gold coin of the United States the sum of Thirty Thousand Dollars, with interest thereon at the rate of ten per cent per annum from date until paid. Said interest payable semi-annually, and if not so paid to become a part of the principal, and bear interest at like rate.

TURQUOISE COPPER MINING AND
SMELTING COMPANY,

By WM. R. SHAFTER, *Its President.*

By W. H. McKITTRICK, *Its Secretary.*

[SEAL.]

345 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa,

No. 5616.

JEPP RYAN, T. C. RYAN, AND E. B. RYAN, Plaintiffs,
vs.
W. S. TEVIS and W. H. MCKITTRICK, Defendants.

Tried at Phoenix, Arizona, December 21st, 1908, and December 22nd, 1908, Before the Court and a Jury, the Honorable Edward Kent, Judge, Presiding.

James Reilly, Esq., Hon. E. S. Ives, Messrs. Neale and Sutter and Frank Cox, Esq., attorneys for the plaintiffs.

Chas. Bowman, Esq., Ben Goodrich, Esq., and Hon. A. C. Baker, attorneys for the defendants.

Transcript of Evidence.

J. S. Jenckes, Jr., Reporter.

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MONDAY, December 21st, 1908.

This cause coming on regularly for trial at this time, a jury having been duly selected and tried, empanelled and sworn to well and truly try the matter at issue herein, the plaintiffs being present in person and represented by James Reilly, Esq., Hon. E. S. Ives, Messrs. Neale and Sutter, and Frank Cox, Esq., their attorneys, and the defendants being present in person and represented by Chas. Bowman, Esq., Ben Goodrich, Esq., and Hon. A. C. Baker, their attorneys, thereupon, after the opening statement by counsel to the jury, the following proceedings were had herein, to-wit:

Mr. IVES: On page 18 of the complaint on the third line from the top, the first word is 1903; that is a clerical error, it should be 1905. I would like permission to change that.

The COURT: You may make the change.

Mr. IVES: Then on page 22, the eighth line from the bottom reads "able and willing to pay to the defendants four-fifths," that is a clerical error; it should be four-sevenths.

The COURT: That may be corrected also.

Mr. IVES: On page 20, about the middle of the page at the end of the second paragraph, it is alleged that the plaintiffs had no knowledge of these judgments and executions until about the blank day of August, 1906, and after the execution of said sheriff's deed. That we find is an error. This complaint was verified by Judge Reilly, the attorney, and plaintiffs wish to change that to state, striking out the words after "until," saying, "until after the advertisement of the property for sale under the execution."

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The COURT: That may be made in the absence of objection.

Mr. IVES: I think, Mr. Goodrich, we might save time, if agreeable to you gentlemen, if we admit that the Turquoise- Copper Mining and Smelting Company was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the Territory of Arizona. Is that admitted?

Mr. GOODRICH: Yes sir.

Mr. IVES: And that the Western Company was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California?

Mr. GOODRICH: Yes, sir.

Mr. IVES: That on and prior to the 29th day of November, 1902, and thereafter until divested of its title as alleged, the Turquoise- Copper Mining and Smelting Company owned the mining claims set forth in paragraph two of the complaint?

Mr. GOODRICH: Strike out the words "as alleged" and it is admitted.

Mr. IVES: Very well strike them out. Now will you read the stipulation as amended, Mr. Reporter?

(Thereupon the reporter reads the following: That on and prior to the 29th day of November, 1902, and thereafter until divested of its title, the Turquoise Copper Mining & Smelting Company owned the mining claims set forth in paragraph two of the complaint.)

Mr. GOODRICH: Now, let's see, I want to understand that, because they had meetings on the 29th of November, and they made that contract.

348 Mr. IVES: Even then the Turquoise Copper Mining & Smelting Company owned it on that day.

Mr. GOODRICH: I didn't know but what the stipulation would go so far as to prevent their introducing——

Mr. IVES: Oh, no.

Mr. GOODRICH: The facts, Mr. Ives, are this property was bought by the Turquoise Copper Mining and Smelting Company from Si Bryant, and there was a note given for a part of the payment or consideration which they agreed to pay for this property. Bryant brought suit and sold the property, and it was only an equity that the company owned.

Mr. IVES: Then put after the stipulation, "subject to the sale of the property under the S. H. Bryant judgment to one Thomas B. McPherson."

Mr. GOODRICH: I don't know but what we will have to change the first part of the stipulation about the ownership of the property because they didn't own the property.

Mr. IVES: They owned it subject to the sale—just read the whole stipulation as it now stands, Mr. Reporter.

(Thereupon the reporter reads the following: That on and prior to the 29th day of November, 1902, and thereafter until divested of its title, the Turquoise Copper Mining & Smelting Company owned the mining claims set forth in paragraph — of the complaint, subject to the sale of the property under the S. H. Bryant judgment to one Thomas B. McPherson.)

Mr. GOODRICH: Very well.

Mr. IVES: I ask you to admit that on and prior to the 29th day of November, 1902, the capital stock of the Turquoise Copper Mining & Smelting Company was divided into 100,000 shares of the
349 par value of \$10 each, and that four-sevenths of the capital stock was owned and controlled by the plaintiffs and three-sevenths was owned and controlled by the defendants, Tevis and McKittrick.

Mr. GOODRICH: We admit it.

Mr. IVES: And that plaintiffs had expended on the property for and concerning their interest the sum of about \$87,000 and the defendants had similarly expended the sum of \$73,000.

Mr. GOODRICH: We won't admit that because it is no part of this case; it don't make any difference what they expended.

Mr. IVES: You admit the first part about the ownership of stock?

Mr. GOODRICH: Yes sir, but not that part about the \$87,000 and the \$73,000.

Mr. IVES: That on or about the 31st day of July, 1902, the Sheriff of Cochise County, by virtue of an execution in the case of Bryant vs. the Turquoise Copper Mining & Smelting Company, sold at public auction to one Thomas B. McPherson all the mines and mining claims in paragraph two of the complaint mentioned and described for the sum of about \$26,341.19.

Mr. GOODRICH: The sale was made, but the amount is different. We won't stipulate as to the amount—we will as to the sale and date of sale. The amount really was something over \$26,000.

Mr. IVES: Then leave that unadmitted except as to the amount.

The COURT: Then the stipulations are that the Turquoise — Mining and Smelting Company was a corporation organized as
350 alleged; that the Western Company is a corporation organized as alleged; that the Turquoise Company owned the mining claims until divested of their title, and on and prior to November 29th, 1902, subject to the sale to McPherson; that prior to the 29th of November, 1902, the capital stock of the Turquoise Company was divided in the proportion of 4/7 to the plaintiffs and 3/7 to the defendants, and that on July 30th, 1902, the sheriff of Cochise County by virtue of an execution in the case of Bryant vs. the Turquoise Company sold the mining claim mentioned in the complaint.

JEFF RYAN, one of the plaintiffs, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. Mr. Ryan, are you one of the plaintiffs in this action?

A. Yes sir.

Q. And the other plaintiffs are your brothers?

A. Yes sir.

Q. Do you know Captain McKittrick?

A. Yes sir.

Q. And W. S. Tevis?

A. Yes sir.

Q. And you knew both of them prior to the 29th of November, 1902?

A. Yes sir.

Q. Were you acquainted with the properties owned by the Turquois Mining and Smelting Company?

A. Yes sir.

351 Q. Are you acquainted with one S. H. Bryant?

A. Yes sir.

Q. You remember the fact of Mr. Bryant's obtaining judgment against the Turquois Mining and Smelting Company?

A. Yes sir.

Q. What was the subject matter of the suit in which Mr. Bryant obtained that judgment?

A. The Turquois Copper Mining and Smelting Company owed Mr. Bryant a difference amounting to twenty odd thousand dollars, and he made demands upon the company at different times and the company did not pay it, so he brought suit and got judgment against the company.

Q. For what did you owe him this money?

A. For the purchase of the mining claims.

Q. For the mining claims mentioned in the complaint?

A. Yes sir.

Q. Did the company have an option on these mining claims or did it own them?

The defendant-objects to the question on the ground that it is not an issue in this case.

Mr. Ives: It is preliminary.

The COURT: If it is material, you may ask him.

Mr. Ives: I will withdraw the question.

Q. Mr. Ryan, as a matter of fact, how were the moneys for the operation of the Turquois Copper Mining and Smelting Company provided prior to the 29th of November, 1902?

The defendant-objects to the question on the ground that it is absolutely immaterial and irrelevant.

352 Mr. Ives: This goes to establish the facts with respect to the \$160,000 mentioned in the contract, and which I think is very material to the issues.

The COURT: Money advanced by Tevis?

Mr. Ives: Yes, Your Honor.

The COURT: I do not understand that counsel on the other side raise any question as to the matter of advancements, except as to the materiality; so what difference does it make about going into the preliminary matters as to how advanced and the reasons?

Mr. Ives: I will withdraw the question.

Q. Prior to the 29th day of November, 1902, had yourself and brothers advanced moneys for the benefit of the Turquois Copper Mining and Smelting Company?

The defendants object to the question as absolutely immaterial and irrelevant and not an issue in this case.

The COURT: I think it is competent under the allegations here to show the interest these people had in the property.

Mr. GOODRICH: It is admitted they owned four-sevenths of the stock.

The COURT: I will permit them to show advances made.

A. Yes sir.

Q. About how much, Mr. Ryan?

Mr. BAKER: This suit is simply for the purpose of recovering the value of four-sevenths of the stock in the corporation: there is nothing said about the \$160,000.

The COURT: It is referred to in the contract.

Mr. BAKER: But this action is not to recover any part of 353 that—the damages is simply as to the value of four-sevenths of the stock only.

The COURT: He may answer the question.

A. Over \$90,000.

Q. Had Mr. Tevis and Mr. McKittrick made advances?

A. Yes sir.

The defendants object to the question for the same reasons advanced to the previous question on the same subject.

The COURT: I overrule the objection.

Q. About how much?

A. Over \$70,000.

Q. Were the amounts advanced in the proportion of four-sevenths and three-sevenths?

A. Yes sir.

Q. As the corporation required money, you gentlemen would advance four-sevenths and Tevis and McKittrick three-sevenths?

A. Yes sir.

Mr. GOODRICH: In order to save repeating the objections to every single question, we will make a general objection to all this line of evidence.

The COURT: I think counsel has gone about as far as he intends to in this respect.

Mr. Ives: Yes sir.

Q. At the time Mr. Bryant brought this suit against the Turquoise Copper Mining and Smelting Company, who was president of the corporation?

A. I was.

Q. Who were the directors?

354 A. The three Ryans—that is, Tom Ryan (Thomas C. Ryan) E. B. Ryan, Captain McKittrick, Mr. Soto and myself.

A. I don't remember whether he was or not.

Q. Who controlled the board of directors?

A. The Ryans.

Q. At the time this suit was brought, was there any money in the

treasury of the corporation that was to pay the amount of Bryant's claim?

A. No sir.

Q. After this judgment was rendered, did you take any steps to protect your interests with respect to the sheriff's sale under this judgment?

A. Yes sir.

The defendants object to the question as leading.

The COURT: Counsel will not lead the witness.

Q. Did you know a man named Thomas B. McPherson at this time?

A. Yes sir.

Q. Where did he reside?

A. In Omaha, Nebraska.

Q. How long had you known him prior to this time?

A. Two or three years.

Q. Had you had business relations with him?

A. Yes sir.

Q. Were they existing at this time of July, 1902, or about that time when this sale was made?

A. Yes sir.

355 Q. In brief what was the nature of your business with him?

A. I sold him a bunch of cattle and a ranch in Arizona.

Q. For about how much money?

The defendants object to the question as immaterial and irrelevant.

The COURT: I sustain the objection.

Q. Did you have any conversation with Mr. McPherson with respect to this Bryant judgment?

A. Yes sir.

Q. Where did such conversation occur?

The defendants object to the question unless the defendants or one of them were present.

The COURT: There is an allegation in this complaint of an agreement between the plaintiffs and McPherson to purchase the judgment and to hold it for their interests, which is the foundation for a particular claim, and it seems proper to prove the agreement with McPherson with respect to the purchase of the property.

Mr. IVES: That is my purpose.

The COURT: I will permit you to prove it.

Mr. GOODRICH: The defendants except to the ruling of the court.

The COURT: I shall only allow this as proof of the agreement.

A. At the Paxton Hotel, Omaha.

Q. State what that conversation was.

The defendants object to the witness stating any conversation that he had with McPherson.

356 The COURT: I think it is proper here to ask him whether an agreement was entered into at this time. He may answer.

A. I told Mr. McPherson about the judgment against the Copper Company and told him I wanted enough money to pay this judgment. He said if I was going to tend to it myself I could draw on him for the money. I said if you let me have the money and the property comes to you, after I get my money out and you get your money, we will divide the property equally; so I left and had the property bid in.

Q. Confine yourself to the conversation, Mr. Ryan. Was anything said about in whose name the property was to be held under the execution and sale?

A. In Thomas McPherson's name.

Q. For what purpose?

The defendants object to the question as calling for a conclusion from the witness.

The COURT: He may answer if anything was said about it.

A. To protect his interests for the money advanced.

Q. Were you present at the execution sale?

A. Yes sir.

Q. Under the Bryant judgment?

A. Yes sir.

Q. At that execution sale was a bid made?

A. Yes sir.

Q. By whom?

A. W. H. Neale.

Q. Whom did he represent?

A. T. B. McPherson.

357 Q. At whose request?

A. At my request.

Q. The property was bid in by Neal for McPherson?

A. By Neale.

Q. For McPherson?

A. Yes sir.

Q. Do you remember the amount?

A. In round figures over \$23,000.

Q. How was the money provided?

A. By draft.

Q. Who made the draft?

A. W. H. Neale.

Q. On whom?

A. T. B. McPherson, South Omaha, Nebraska.

Q. After that execution sale did you have any conversation with Mr. McKittrick or Mr. Tevis with respect to any of these transactions?

A. I don't think personally—I may have written.

Q. To Mr. McKittrick?

A. Yes, to Mr. McKittrick.

Q. On or about the 29th day of November, 1902, did you meet Captain McKittrick?

A. Yes sir.

Q. Where did this meeting take place?

The COURT: About what time was this property bid in on execution sale?

Mr. IVES: The 31st day of July, 1902: that is the allegation that is admitted.

358 The COURT: Very well.

A. Wilcox, Arizona.

Q. This meeting was held about when?

A. The last of November—about the 29th, I think, of November.

Q. Was the meeting accidental or in pursuance of an arrangement?

A. It was first called for some time in October and postponed until November.

Q. The stockholders' meeting of the Turquoise Copper Mining and Smelting Company?

A. I think so.

Q. Who was present at Wilcox at this time?

A. Captain McKittrick, Mr. Soto, T. B. Ryan, E. B. Ryan and myself.

Q. The three plaintiffs?

A. Yes sir.

Q. Who got to Wilcox first, Mr. Ryan?

A. The three Ryans.

Q. Then Captain McKittrick came in?

A. Yes sir.

Q. Where were you at Wilcox?

A. At the hotel—I don't know the name of it.

Q. Now state the first meeting you had with Captain McKittrick at this time; what was said at that meeting and who was present.

A. We had the annual meeting there and attended to the details of the meeting and then after the meeting I asked the Captain what he intended to do with the mining proposition, and he says I don't know that we have anything to do with it you have us frozen out. I said that is not our intention to freeze anyone out, you put your money in in good faith and we are willing to go in with you and make any kind of a reasonable deal to protect each interest. He says well what kind of a proposition have you to make and I said I don't know, we will make any reasonable one where we can get our money out. So he said you draw up an agreement. So we went up stairs, the three of us, my two brothers and myself, and I drew up an agreeemnt, and Captain McKittrick came up and read the agreement and he says, that's too much like a promissory—

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Q. One moment—What were the terms of that agreement?

Mr. GOODRICH: I object to that—it is in writing.

Q. Was that ever executed?

A. No sir.

Q. Have you got it now?

A. No sir.

Q. What was done with it?

A. It was destroyed.

Q. Now what were the terms of that agreement?

Mr. GOODRICH: I object. It is not the final agreement, and it is immaterial and irrelevant in this case.

The COURT: What difference does it make, Mr. Ives?

Mr. IVES: It goes to show the entire negotiations, if it please the Court: I think it is very material.

The COURT: I do not see why if subsequently this other agreement was entered into.

360 Mr. IVES: It is simply a part of the conversation: really it is the basis for the conversation.

Mr. GOODRICH: The law is well settled that when a contract is put in writing it takes the place of all negotiations.

Mr. IVES: It tends to show the nature of the negotiations.

The COURT: I sustain the objection.

Q. State what the conversation was between Captain McKittrick and yourself.

A. He read this agreement and said it is too much like a promissory note and Mr. Tevis would not sign it. I said what kind of an agreement do you want, we are willing to go into anything that looks reasonable to us where we can get our money out. So we talked the matter over in regard to the division of stock and the different places to put the treasury stock and creating a trust fund, and he went out with the understanding that——

Mr. GOODRICH: Don't tell what the understanding was.

Q. Was anything said about Mr. Tevis?

A. Yes sir.

Q. State the conversation, if you can.

A. Not until he came back with this agreement.

Q. Then state the conversation as you were telling it before you were interrupted.

A. He went out and had an agreement made and brought it up into our room: Now, he says, boys, Mr. Tevis is a multi-millionaire and rich and influential, and by putting him in control of this property, or giving us control of the property, we will try to handle it so each of us can get all our money back. I says, Captain,
361 suppose you don't handle it, where do we come in. He says if we don't sell the stock we will return to you the property the same as it is today.

Mr. GOODRICH: We ask that that be stricken out, because the contract speaks for itself.

The COURT: Do I understand this is the conversation prior to entering into the agreement or contract?

Mr. IVES: Yes sir; after it was drawn but before it was signed.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the court.

A. (The witness continuing:) And all the work done with no expense to you. I read the contract over and say this is not very plain, Captain, it is not definite enough, and he says what we want

to do is to be fair between all of us, and I says it is a question of honor between us all, and you folks have been square with us and we will let it go, and the three of us signed the contract.

Q. Now is that the contract?

A. That is the present contract, yes sir.

Q. Who drew that contract?

A. A newspaper man in Willcox, Arizona—the Captain had him draw it up.

Q. Was the contract drawn in your presence?

A. No sir.

Q. Was this newspaper man present at the time?

A. He came up with the Captain in the room, with the
362 contract.

Q. Was any lawyer there representing anybody?

A. No sir.

Q. Do you know the name of this newspaper man?

A. No sir.

Mr. GOODRICH: We object to that—

The COURT: There is nothing before me now to object to—he has answered the question.

Mr. IVES: I think, may it please Your Honor, I would like to re-read the contract to the jury.

The COURT: As an item of news?

Mr. IVES: Yes, as an item of news: I think perhaps they did not get the full porport of it when first read. Before I read this—
(To the witness:) Was anything said by Captain McKittrick at that conversation about the control?

A. Yes, he said they would have to have control.

Q. Did he say why?

A. Because Mr. Tevis would not enter into the agreement without he was in control of the property.

(Thereupon counsel reads the agreement to the jury as follows:)

“This agreement made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan and E. B. Ryan, of Leavenworth, Kansas, parties of the second part, witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and
363 Smelting Company, a corporation, organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and whereas, the parties of the first part now own and control three-sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof, and whereas, the parties of the first part (that is Tevis and McKittrick) are desirous of securing the controlling interest of the said capital stock of the said corporation and thereby obtain the full management of the affairs of the said corporation, now therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital

stock shall be placed in the treasury of said company to be sold in whole or in part by the said parties of the first part at such price or prices as the Board of Directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47. Second to use the next \$20,000 received from the sale of said stock to develop the claim now owned and controlled by this company. The parties of the second part hereby agree to and with the parties of the first part that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices and allow the parties of the first part

364 to appoint or elect such officers in their place and stead as they may desire; said second parties agree to give the parties of the first part as their interest in the said company a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last mentioned shares as possible at not less than par value and the proceeds of any such sales of said block of stock shall be divided pro rata among the parties hereto until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000 when the remaining shares shall be divided equally among them according to their respective interests in the ratio aforesaid. It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned as above set forth. The parties of the second part (the Ryans) shall not be liable for any expense connected with the operation of this company excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first

365 part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part (Tevis and McKittrick) to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement. It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to

do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument. Witness our hands the day and year first above mentioned." Signed by all the parties.

Q. After this contract was signed, Mr. Ryan, did you resign as president of the corporation?

A. Yes sir.

Q. And as director?

A. Yes sir.

Q. Did all the other Ryans resign also?

A. Yes sir.

Q. As officers and directors?

366 A. Yes sir.

Q. As a matter of fact were the articles of incorporation changed so that the capitalization of this company—Never mind, I can prove that by the minutes.

The Court: It is not disputed, I suppose; but you may as well ask the question.

Q. Were the articles of incorporation changed from 100,000 shares at \$10. per share to one million shares at \$1. per share?

A. Yes sir.

Q. Were 240,000 shares of that stock placed in the treasury?

The defendants object to the question.

The Court: I thought these were all admitted, but if counsel objects I will sustain the objection.

Q. From and after the 29th day of November, 1902, did you or any of your brothers take any part in the management of that corporation or any of its affairs?

A. No sir.

Q. Did you interfere in any way with the management of the corporation by Messrs. Tevis and McKittrick?

A. No sir.

Q. Or either of them?

A. No sir.

Q. What was the regular place of meeting of the stockholders of the corporation?

A. Willcox, Arizona.

Q. And where were the books kept?

367 A. At Willcox, Arizona.

Q. And after the 29th of November, 1902, what was the regular place of meeting of the corporation?

A. I could not say—California, I think, Bakersfield.

Q. Where were the books? Were they kept at Willcox after the 29th of November, 1902?

A. No sir.

Q. Who took them away?

A. Captain McKittrick, I guess.

Q. To California?

A. I think so.

Q. After the conversation that you had with Mr. McPherson at Omaha and prior to this meeting on the 29th day of November, 1902, had Mr. McPherson ever indicated to you that he would not live up to the agreement which you and he had made as you have testified to?

A. No sir.

Q. Was the agreement between Mr. McPherson and yourself, with respect to all you have testified, in full force and effect on November 29th, 1902?

A. Yes sir.

The defendants object to the question as leading, and furthermore counsel has been leading the witness right along.

The COURT: Counsel should not ask leading questions under objection, of course.

Mr. IVES: Very well.

Q. After the execution of this contract state whether or not you made any endeavor to sell any of this trust stock that was
368 put in the hands of Captain McKittrick as trustee?

The defendants object to the question as absolutely immaterial. That 200,000 shares of stock are not in this case; that was in trust and had nothing to do with it.

Mr. IVES: They have a general denial of the performance of the contract.

The COURT: That is one of the requirements on the Ryans as well as on Tevis and McKittrick?

Mr. IVES: Yes sir.

Mr. GOODRICH: That has reference to the trust stock in McKittrick's hands; an entirely different matter.

The COURT: But the agreement requires the Ryans to do the best they can to sell that stock, and they have alleged that they did, and you have denied they did; so they have a right to prove it. I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. Yes sir, I tried to sell some of it.

Q. Can you mention any parties to whom you tried to sell any of it?

A. I tried to sell some of it to Mr. O. B. Taylor and Amos Wilson, and one or two others that I don't recollect their names now.

Q. Was any of that stock sold—that 200,000 shares of stock held by McKittrick as trustee?

A. No sir, not that I know of.

Q. Did you ever receive any of the proceeds?

A. No sir, not that I know of.

369 Q. Did you sell any of your individual holdings of stock?

A. No sir.

Q. Or did either of your brothers?

A. No sir.

Mr. IVES (Handing letter to Mr. Goodrich): Do you admit that that is—I offer in evidence this letter.

Mr. GOODRICH: We object; so far as Mr. Tevis is concerned there is no conspiracy or collusion alleged against him.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Mr. IVES: Do you admit the proof of that letter?

Mr. GOODRICH: We will admit that it is McKittrick's signature.

Mr. IVES (Reading the letter):

"DECEMBER 8th, 1902.

Bakersfield Club.

Ryan Brothers, Leavenworth, Kansas.

DEAR SIR: I enclose with this our agreement signed by Tevis and me. Soto will have the amended articles of incorporation published and will send them to Jepp to sign. Send your resignations and your stock endorsed as soon as possible so we can reorganize and sell stock to meet the judgment due February 1st. I hope luck will be with us and that we pull out winners.

(Signed)

W. H. MCKITTRICK."

Q. You received this letter, Mr. Ryan?

A. Yes sir.

The COURT: Mark it plaintiff's exhibit A.

(Thereupon the letter is received in evidence and marked accordingly by the Clerk.)

370 Q. I call your attention to the words in this letter, "I enclose the agreement signed by Tevis and me," was such an agreement enclosed?

A. Yes sir.

Q. Signed by Mr. Tevis?

A. Yes sir.

Q. Was that exhibit A attached to the complaint?

A. Yes sir.

Q. Did you do anything with respect to his request to send in your resignations?

A. Yes sir.

Q. What did you do?

A. We resigned, and each one signed the resignation and sent it to him, resigning.

Q. Did you send in your stock?

A. Yes sir.

Q. Was it endorsed?

A. We had the bank send it in—the bank had it.

Q. Where did you reside at this time in December, 1902?

A. At Leavenworth, Kansas.

Q. Where did your brothers reside?

A. At Leavenworth, Kansas.

Q. After December, 1902, did you have any further conversations with Captain McKittrick?

A. Yes sir.

Q. Where were such conversations held?

A. One was in Los Angeles at the Hollenbeck Hotel.

Q. About what was the date of that conversation?

371 A. Along in May, 1905.

Q. And where were you living at that time?

A. At Banning, California.

Q. How long had you been living there?

A. About a year.

Q. During the time you had been living at Banning, California, had you had any communications with Captain McKittrick?

A. Yes sir.

Q. Did he know where you resided during this time?

A. Yes sir.

Q. Coming to this conversation with Captain McKittrick at the Hollenbeck Hotel in May, 1905, was that by accident or by appointment?

A. It was by accident.

Q. Where did you meet him?

A. I met him on the street in Los Angeles, and we went back into a back room of the Hollenbeck Hotel, or bar—there were some small rooms there—and we got to talking about this proposition, and I asked him what they intended to do about this mining deal; that the time was past; and I said I am going to start suit or do something about it. He said, now don't bring suit, because I will say that your interest is protected. So I didn't bring any suit at that time.

Q. Prior to May, 1905, had you done anything towards requesting them to comply with the terms of the contract?

A. Yes sir.

Q. What?

A. Along about the two years we notified him—or my lawyer did—that we were ready to comply with the terms of the contract, and I do not think we ever got any reply to it at all.

372 Q. What do you mean by that—that you were ready to comply with the terms of the contract?

A. To pay our part of the judgment that they bought and get the property back.

Q. Get all the property back?

A. Our interest—four-sevenths.

Q. You had made such a proposition?

A. Yes sir.

Q. Prior to the meeting in May, 1905?

A. Yes sir.

Q. Was that discussed between McKittrick and yourself at this conversation?

A. I think it was; we talked about the whole thing in general.

Q. State, Mr. Ryan, as near as you can, the substance of that conversation.

A. I told the Captain that we wanted our interest—wanted to know what we were going to get out of it, and he said, you will be protected fully—Mr. Tevis will see that you are protected. I said I would like to see Mr. Tevis and he said I will let you know when

you can see him. I said I don't want to start suit, but unless I get some satisfaction I will start suit. He said don't start suit at this time; I will see Mr. Tevis and your interest will be protected.

Q. At that time did you know that any suit had been brought against the Turquoise Company in Kern County, California?

373 A. No sir.

Q. At that conversation was anything said about the Western Company?

A. Yes sir; Mr. McKittrick said that the Western Company were uneasy about their money but as Mr. Tevis had control of that company, or owned the company, he thought he could handle it.

Q. Did McKittrick say anything to you at the time about this suit brought in Kern County, California?

A. No sir.

Q. When did you next see Captain McKittrick after that?

A. I don't remember when I saw him next.

The COURT: Gentlemen of the jury, we will suspend here until 1:30; meanwhile don't talk about the case during the noon hour to anyone, or let anyone talk to you about it, or form or express any opinion about it until the matter is finally submitted to you. Come back at half past one and we will take the case up at that time. (Thereupon Court takes a recess until 1:30 P. M.) Witness excused temporarily.

(After the noon recess the jurors come into Court and are called by the Clerk, all answering to their names and being all present in the jury box, the trial is resumed.)

JEPPI RYAN, recalled as a witness for the plaintiffs, having been heretofore duly sworn, testifies as follows:

Direct examination resumed by Mr. IVES:

Q. Mr. Ryan, what property did the Turquoise-Copper Mining and Smelting Company own other than these mining claims?

374 A. They owned a couple of 12 or 15 horse hoisting engines and one or two little cabins and an assay outfit.

Q. When did you first learn of the suits in Kern County, California and in Cochise County, Arizona, against the Turquoise-Copper Mining and Smelting Company by the Western Company?

A. In July, 1905.

Q. What was your information and the source of it?

A. I got a letter from Mr. Gleason enclosing copies of the notices taken from the newspapers.

Q. Copies of what?

A. Of the sheriff's sale—or going to sell.

Mr. GOODRICH: That was in July, 1905?

A. Yes sir.

Q. From Gleason?

A. Yes sir.

Mr. IVES: Had you been in Arizona between November, 1902, and the time you received this notice

A. No sir.

Cross-examination.

By Mr. GOODRICH:

Q. Mr. Ryan, you state in your testimony that you had expended 90,000 dollars, and the defendants had expended 73,000 dollars on some property in the Turquoise- district: what property was that that these expenditures were made on?

A. The claims belonging to the Turquoise- Copper Mining and Smelting Company.

Q. These claims mentioned in the complaint?

375 A. Yes sir.

Q. Wasn't that expenditure made on the Gleason property entirely?

A. Part of it—not all of it.

Q. What claims of the Gleason property was that expenditure made on—or any property?

A. What other claims?

Q. Yes.

A. Well, we spent some of the money on the claim that we bought from Si Bryant, the Tom Scott and some on the Maxon.

Q. Is that one of the claims mentioned in this suit?

A. Yes sir.

Q. I want to know how much money was expended on the claims not mentioned in this suit.

The plaintiffs object to the question on the ground that it is recited in the contract.

Mr. GOODRICH: Then I ask that the testimony be stricken out if the contract is to control.

The COURT: There is nothing in the contract to show in what proportion the money was to be advanced. • I allowed the testimony that it had been advanced in the proportion of seventy to ninety to show what the interest of the parties was in that \$160,000, but where it was expended or how does not seem to me to be material.

Mr. GOODRICH: It is stated in the complaint \$90,000 and it is in his testimony \$90,000: I want to show that there was not \$90,000 expended.

376 The COURT: They would be bound by the allegations of the complaint.

Mr. GOODRICH: That may be true, but his statement has made an impression on the minds of the jurors.

The COURT: If you think it is important, you may show that the whole \$90,000 was not put on these claims.

Q. Is it not a fact that several thousand of that \$90,000 was expended on claims outside these claims?

A. All of it was expended on property that we had bonds on and belonged to the company at the time we made the contract.

Q. Quite a little of the money was spent on the Gleason claim, wasn't it—not included in this suit at all?

The plaintiffs object to the question on the ground that there is no claim included in this suit—that it is an action for damages.

The Court: The papers show what is in the suit.

Mr. GOODRICH: I want the jury to know what claims it was expended upon.

The Court: You may ask the witness if these claims on which the money was expended are the claims specified in paragraph two of the complaint, if you please.

Q. Is it not true that several thousand of the \$90,000 that you say was expended by you and your brothers was not expended on the claims mentioned in the complaint?

A. Yes, there was several thousand spent on the Gleason claim, and—

Q. Those are not claims mentioned in the complaint?

377 A. I don't remember exactly what the claims mentioned in the complaint are, but it was a part of the group when I made the contract.

Q. Now you say you resigned after November, 1902?

A. Yes sir.

Q. When did you send in your resignation?

A. After we received the contract from Mr. McKittrick.

Q. That was in response to the letter that you have offered in evidence on December 8th, 1902?

A. Yes sir.

Q. How long after that was it?

A. I don't remember.

Q. At the same time in that letter of December 8th, 1902, written by Mr. McKittrick to you, he enclosed you the contract for signature, didn't he?

A. Yes sir.

Q. You signed it, then, after that day?

A. Signed the contract?

Q. Signed the contract that he sent to you, after that day?

A. No sir.

Q. You sent your resignations after that day?

A. Yes sir.

Q. And forwarded it after that day?

A. Yes sir.

Q. At the same time you sent the old stock back?

A. Yes sir.

Q. Do you know what time it was received?

A. No sir.

378 Q. Don't you remember getting a telegram from Captain McKittrick dated about the 24th of January, to the effect that he had to postpone the meeting on account of the stock and resignations not arriving in time for that meeting of the 24th?

A. No sir.

Q. You say you didn't get any telegram?

A. No, I don't remember it.

Q. How long were you living at Banning, Mr. Ryan?

A. I didn't live at Banning; that was my post office address.

Q. Where were you living?

A. Sixty miles from Banning out at the mines.

Q. How long were you out there?

A. From May—something over a year.

Q. From May of what year?

A. Until August, 1905, I think.

Q. From May, 1904, to August, 1905.

A. Yes sir.

Q. Then where did you go?

A. Lived in Los Angeles?

Q. You stated in your direct testimony that while you were talking to Captain McKittrick at the Hollenbeck Hotel, you threatened to bring suit of some kind?

A. Yes sir.

Q. What sort of suit were you going to bring?

A. Suit on the contract.

Q. The same suit you have brought?

379 A. Yes sir.

Q. He told you he would see Mr. Tevis and that he would protect your interest?

A. That he and Mr. Tevis would protect my interest.

Q. Who is the lawyer you referred to in your testimony?

A. Frank Garrett was the first lawyer I had.

Q. Garrett of Los Angeles?

A. Yes sir; and then Mr. Conkin.

Q. Which one notified Tevis and McKittrick that you were willing to pay your part of the judgment?

A. I think both of them.

Q. What was the date of that notification?

A. I don't remember—about the time—right after the two years had expired.

Q. Was that after you had the conversation with Captain McKittrick at Los Angeles?

A. Before that.

Q. How do you know your lawyers notified them?

A. I saw them write the papers, and they got back the register receipt.

Q. Is that the only way you know it?

A. Yes sir.

Q. The only notification you have had, then, of any of these suits in Kern County, California, and Cochise County, Arizona, was received the 9th of July 1905, in a letter from Mr. Gleason?

A. Yes sir.

Q. You never got any information from Captain McKittrick?

380 A. No sir, not that I remember of.

Q. Do you say you didn't?

A. No.

Q. Did you get information from him to the effect that the suits had been brought—a copy of the minutes of the board of directors and stockholders?

A. Not until way afterwards.

Q. What time afterwards?

A. It was a month or two afterwards—probably more than that.

Q. Before the sale, wasn't it?

A. Yes sir, I think it was before the sale.

Q. Then you had plenty of time to protect against the sale, didn't you?

The plaintiffs object to the question as immaterial and tending to mislead the jury.

Mr. GOODRICH: He alleges he had no information about these things.

The COURT: I think it is argumentative. I sustain the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Redirect examination.

By Mr. IVES:

Q. When, Mr. Ryan, did you sign the contract, Exhibit A attached to the complaint?

A. How's that?

Q. When did you sign the contract Exhibit A annexed to the complaint?

381 A. Is that the main contract?

Q. Yes.

A. At Wilcox, November 29th, 1902?

Q. Did your brothers sign it at that time?

A. Yes sir.

Q. The money that was expended on this Gleason claim about which you have testified—state whether or not the company at the time of that expenditure had any interest in the Gleason claim?

A. Yes sir they owned—

The defendants object to the question as incompetent, irrelevant and immaterial.

The COURT: I think that immaterial—any question about this \$90,000 and \$70,000, except as showing the proportionate interest of the two parties in the \$160,000 dollars.

Mr. IVES: Very well.

Recross-examination.

By Mr. GOODRICH:

Q. You say that contract was signed at Wilcox on the 29th day of November, 1902?

A. Yes sir.

Q. And was taken to California by Captain McKittrick for Mr. Tevis's signature?

A. Yes sir.

Q. But your resignations were not sent and the stock was not sent back until some time in January?

382 A. Not until after we received the letter with the contract.

Q. That is the letter of December 8th, is it?

A. Yes sir.

Q. How long after that, now?

A. I don't remember.

Q. Ten days, two weeks or three weeks?

A. It seems to me we sent it as soon as we could get to it. Whether we were all there or not I don't remember—we were away a good deal.

Q. At the time you sent in your resignations and at the time you sent back the old stock for cancellation, didn't you know that the sale under the Si Bryant judgment was to take place on the 31st of January?

A. Yes sir.

Q. I mean the time for redemption had expired?

A. Yes sir.

(Witness excused.)

THOMAS C. RYAN, one of the plaintiffs, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. What is your full name?

A. Thomas C. Ryan.

Q. You are one of the plaintiffs in this action?

A. Yes sir.

Q. You were at Willcox on the 29th day of November, 1902?

A. Yes sir.

Q. Do you know Captain McKittrick?

383 A. I do.

Q. Did you have— Were you present at any conversations with Captain McKittrick and your brother Jepp Ryan at Willcox at that time?

A. I was.

Q. Please state what occurred at these conversations?

A. We had our meeting of the mining company and the Captain asked us what we were going to do—or we asked him what he was going to do about the mining deal, and he said he didn't know what they would do; that we were all right but it looked liked they were frozen out. We told them there was no one frozen out; we didn't want to freeze anyone out; we wanted to all get our money out of it; we wanted to fix up some kind of an arrangement whereby we could all get out of it. So we wrote a contract and the Captain looked at it and said he would not sign that and that Mr. Tevis would not sign it because it was like a promissory note, and would not sign anything like that at all. The Captain took this contract and got another one made and brought it up—

Q. Prior to his having another one made and after he said Mr. Tevis would not sign the first one, did you have any conversation with him with respect to what he wanted to do?

A. He wanted us to resign from the company and to get Mr. Tevis to get in it, being the head of the concern; that he was a very rich man—a multi-millionaire—and through his friends we could finance this company, and we would all get our money back. Jepp

told him he didn't like the looks of that contract—that it didn't look plain to him. The Captain said, that's all right, we will see that you get your money back whether we come up with this contract or not, you will get your money back at the end of the time, if we don't sell our stock.

Q. Then he brought the contract up, did he?

A. Yes he brought the contract up with a printer, I believe it was—a printer in Willcox. We looked over the contract and after talking about it for a while, we said that we had always got along well together, and if that was the way he said it was, we would sign it, and we all signed the contract.

Q. Did he say anything at all about whether you would get your interest back if they failed to sell stock?

A. Yes sir.

Q. What did he say about that?

The defendants object to the question on the ground that the contract speaks for itself. He is proving the contract.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. He said that Mr. Tevis was a very rich man, and if they could not sell the stock out in California, they would see that we got our interest back.

Q. You signed the contract, then, did you?

A. Yes sir.

Q. And you afterwards signed the resignation as director, did you?

A. I did.

Q. State whether or not you delayed signing it after you received the resignation.

A. No, I think we signed it right away.

Q. Have you ever received any of your interest back?

A. No sir.

Q. Did you ever receive any money for any sale of stock back since that time?

A. No sir.

The defendants object to the question on the ground that the defendants never obligated themselves to pay back anything.

The COURT: I overrule the objection—he may state the fact.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Q. Who has managed for you and your brothers this transaction since the time of that contract—which one of them?

A. Jeppe has done all the managing of it, he being on the ground and we were away.

Q. Where have you been since the contract was executed?

A. I have lived down in Kansas.

Q. Did you ever receive any notice of any suit that was brought by the Western Company against the Turquoise-Copper Mining and Smelting Company in Kern County, California?

The defendants object to the question on the ground that it was

not the duty of these defendants to notify these people: they are simply stockholders and the stockholders do not have to be notified of suit against a corporation.

The COURT: Nevertheless, he may testify as to the facts.

Mr. GOODRICH: Then it is immaterial, isn't it?

386 The COURT: I do not know yet at the present state of the suit. I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. No, I never received any.

Q. And you didn't receive any notice of this suit brought in Cochise County on the judgment?

The Defendants interpose the same objection as to the preceding question.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. No.

Q. When did you first hear of those suits?

The defendants object to the question as irrelevant and immaterial.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. I don't know when it was—it was when I heard from Jepp, he was tending to all the business and I didn't pay any attention to it.

Q. What is your business, Mr. Ryan?

A. I am a chemist and assayer.

Q. On and prior to November 29th, 1902, what had been your business?

A. I had been in the mining business.

Q. For how long?

387 A. About since 1889.

Q. Are you familiar with the mines mentioned in paragraph two of this complaint, owned by the Turquoise Copper Mining and Smelting Company?

A. Yes sir.

Q. Are you familiar with the district in which these mines are situated?

A. Yes sir.

Q. You had worked at those mines?

A. Yes sir.

Q. For how long?

A. Oh, I had been there, I guess, off and on for eighteen months.

Q. Were you familiar with what the development of these mining claims was?

A. Yes sir.

Q. Do you know what was the value of these mining claims?

Mr. GOODRICH: If the Court please, I would like to ask the witness some questions before he answers that.

The COURT: He may answer if he knows or not.

A. I do.

Q. What was the value?

Mr. GOODRICH: Now I would like to ask him a few questions first.
The COURT: Very well.

By Mr. GOODRICH:

Q. You say you are a chemist and assayer?

A. Yes sir.

358 Q. How long have you been a chemist and assayer?

A. Well, I was chemist and assayer for the Globe Smelter five years in Denver—head assayer.

Q. When was that?

A. From 1899, or 1889, I think, until about—I left there in July, 1904.

Q. From 1889 to 1904?

A. To 1894—to 1904—No, from 1889 to 1904. I left the Globe Smelter in 1894.

Q. Well, you really mean from 1889 to 1894?

A. Yes sir.

Q. Instead of 1904?

A. Yes sir, that is it.

Q. What familiarity have you had with the working of mines and the value of mines?

A. I worked a mine in California for five years.

Q. What mine was that?

A. The Lost Horse mine.

Q. When was that?

A. I went out there in, I think, about December 1894.

Q. Up to when?

A. I ran that for five years.

Q. Up to 1899?

A. I came away from there, yes, about 1899.

Q. What part of the work did you do: were you assayer there, chemist, or what?

A. Assayer and superintendent of the mine—ran a mill.

Q. Did you do any work in the mine?

389 A. Yes sir.

Q. As a miner?

A. Yes sir.

Q. Did you use the pick and drill?

A. Used the pick and drill and timbered, and done everything.

Q. What sort of mine was that?

A. A gold mine.

Q. What sort of mines are these in question here?

A. Copper mines.

Q. Did you ever work in a copper mine?

A. I did out here.

Q. How long did you work as a miner?

A. I didn't work as a miner.

Q. What position did you occupy out there?

A. General overseer.

Q. What were your duties?

A. To go down in the mine and tell them where to drift and dyke, and how to put in the timbers.

Q. What amount of development was there on any of these claims?

A. I think one shaft was down to a little over 200 feet.

Q. A perpendicular shaft?

A. Yes sir.

Q. Any drifts?

A. Yes sir.

Q. How many?

A. Several—I don't remember just how many now.

390 Q. What mine was that?

A. That was on the Gleason claim.

Q. On the Gleason claim? That is not one of these claims, is it?

A. It was at that time.

Q. It is not one of the claims mentioned in this complaint, is it?

A. I don't know.

Mr. IVES: It is not.

Mr. GOODRICH: It is not?

Mr. IVES: No.

The WITNESS: Well, I was on another shaft that was down a little over 150 feet when I was on it.

Q. What claim is that on?

A. I think that is the Maxon, if I remember right.

Q. Is that one of these claims?

A. Yes sir.

Q. How deep was that—150 feet?

A. I don't remember exactly—150 or 160; somewhere around there.

Q. Was that a perpendicular shaft?

A. Yes sir.

Q. Were there any drifts from that?

A. Yes sir.

Q. How many? How far did you drift?

A. I don't remember just how far they were now.

Q. Did you find anything in these drifts or shafts?

A. Lots of hard rock.

391 Q. Did you find any ore?

A. Yes sir, a little.

Q. In paying quantities?

A. No sir.

Q. Is that all that was done on that mine?

A. All while I was there, yes sir.

Q. What other one of the claims did you do work on—I mean mentioned in this complaint?

A. I don't know the name of it—it is one of the Bryant claims: the one that had a long tunnel on it.

Q. Who put the tunnel in there?

A. I could not tell you that. I always thought Mr. Bryant did.

Q. You didn't put it?

A. No sir.

Q. Did the Turquoise Mining Company put it in?

A. No sir.

Q. What did you do in that: stope out a lot of ore and ship it?

A. Yes sir.

Q. Where to?

A. To El Paso.

Q. What did it pay—anything?

A. Yes sir.

Q. How much?

A. I don't remember now.

Q. Very little?

A. Pretty good.

392 Q. How much?

A. I don't just remember the assays on it: I wasn't attending to the bookkeeping.

Q. As a matter of fact the assays didn't correspond with the amount of ore reported by the mill, did it?

Mr. IVES: I think you are carrying this line of questioning a little too far. We object.

The COURT: You are not asking him now as to the value; but about this witnesses ability to testify as to the value.

Mr. GOODRICH: Your question is what is the value of these mining claims, isn't it?

Mr. IVES: Yes sir.

The COURT: He is only testifying now as to his competency.

Mr. GOODRICH: The other objection, then, is that the value of the mine is not the measure of damages in this case.

The COURT: The value of the stock is, I presume, if there is any damage at all.

Mr. GOODRICH: The question is whether this is an action of tort or an action on a contract.

The COURT: Would not the value of the stock be the measure of damages, if there is any damages at all in the case under their third cause of action, which is the only one left now, as I understand it?

Mr. GOODRICH: I think it would, but counsel seem to take the other view. As I understand this is an action in tort, but they say it is an action on a contract, and if that is the case, the measure of damages would be the value of the stock.

393 The COURT: And the value of the stock would depend on the value of the property.

Mr. IVES: Yes sir.

Mr. GOODRICH: What stock are you talking about?

Mr. IVES: Their four-sevenths.

Mr. GOODRICH: Of the original stock?

Mr. IVES: Yes sir.

Direct examination resumed by Mr. IVES:

Q. What, Mr. Ryan, in your opinion, is the value of these mining claims described in this complaint?

The COURT: You will remember, Mr. Ryan, that he is not referring to these outside claims, but only the claims specified in the com-

plaint. Perhaps you had better look at this. (Hands witness the complaint.)

Mr. GOODRICH: I would like to have counsel fix some date now.

The COURT: Counsel should state whether at that time or now.

Q. November, 1904?

A. I think they were worth a half a million dollars.

Cross-examination.

By Mr. GOODRICH:

Q. You make your estimate basing it on that being a mining country and the country developed around there, and the ore taken out around there, and the indications and assays of lots of the rock—Is it not a fact that no ore was found in any of these claims?

A. No sir.

394 Q. What particular claim mentioned in this complaint was any ore found and taken from?

A. There was ore taken from this Tom Scott, or Tip Top—it is the claim that has the big tunnel on it—known as the Bryant mine: there is good ore in that mine.

Q. How much in sight there?

A. I don't know: I never measured it.

Q. Did you ship the ore?

A. Yes sir.

Q. How much?

A. A good deal of it.

Q. You make your estimate, then, from the value, as you contend, of the surrounding mines, rather than from the value of that particular mine?

A. There was good ore being shipped out of camp right adjoining these claims.

Q. You know that ore extends into these claims?

A. Yes sir.

Q. How do you know?

A. By the trend of the ledge.

Q. What ledge are you speaking about now?

A. The ledge that trended right out of the Gleason under the mining property of this mine.

Q. Give us the name of some claim that you denominate as the Gleason claim.

A. It was known as the McKittrick shaft: the ore dipped right under the mountain from that shaft.

Q. Do you know whether or not there was any ore shipped
395 from the Gleason claim that you speak of?

A. I think there was some ore shipped.

Q. Do you know what it realised?

A. No sir, I do not.

Q. Don't you know they lost money on every pound of ore they shipped from the Gleason mine?

A. I don't know anything about it: I wasn't keeping the books.

Q. Then you didn't know the value of the ore in the Gleason mine dipping under the claims mentioned in the complaint?

A. We just started——

Q. Answer the question—Then you didn't know the value of this ore dipping from the Gleason claim into these claims mentioned in the complaint?

A. No, not at that time.

Q. Did you at any time prior to the 29th day of November, 1902?

A. From assays made on the ore taken out of there.

Q. Where?

A. That claim.

Q. Which one of these claims mentioned here?

A. Well, they shipped good ore out of the Bryant claim.

Q. How much ore did they ship out of the Bryant claim?

A. I don't know how many cars.

Q. How many tons?

A. They shipped quite a while there.

Q. How many tons—can't you give an estimate about it?

396 A. No, I don't remember just how much.

Q. Were you not the overseer and superintendent?

A. For a while.

Q. For how long?

A. A little over a month.

Q. How many cars or tons of ore did they ship during that time?

A. They didn't ship any while I was superintendent.

Q. How do you know they shipped good ore out of there at all?

A. Because it was piled on the dump.

Q. Was it shipped at all?

A. Yes sir.

Q. Who shipped it?

A. The company shipped it.

Q. Do you know what it realized?

A. No sir.

Q. You don't know that it put them in debt every time they made a shipment?

A. I know that didn't bring them in debt.

Q. How do you know?

A. Because the assays from the smelter showed that it didn't bring them in debt.

Q. Did you see the assays?

A. I did.

Q. And you don't remember anything about it except that it was rich ore, and you don't know how much was shipped?

A. No sir—I remember that it was very rich ore.

397 Q. What sort of ore?

A. Silver; copper—a kind of oxidized ore.

Q. Do you know what it cost to take it out?

A. Not a great deal; a couple of men took it out—it was right near the mouth of the tunnel.

Q. Do you know how much was taken out of the Gleason claim?

A. No sir.

Q. You don't know anything about that?

A. No sir.

Q. Didn't you work in the Gleason claim?

A. Yes sir.

Q. Don't you know anything about that ore at all?

A. Yes sir.

Q. What other claim besides that one with the long tunnel in it do you know anything about?

A. The Gleason claim and——

Q. Of those mentioned in the complaint?

A. All the mines we had down there.

Q. Did you take ore out of every one of them?

A. All but the furthest shaft—No, 3 shaft.

Q. Isn't that ore still on the dump right there now?

A. No, not the ore I am talking about.

Q. On No. 3 shaft?

A. No, 3 shaft?

Q. Yes.

A. I couldn't say whether it is there now or not; I haven't been there.

398 Q. Do you know the Tom Scott claim?

A. Yes sir.

Q. Any development on that—any ore taken out of that, if you know?

A. I don't know that I would know it by that name—there was the Tip Top and the Tom Scott——

Q. I am asking you about the Tom Scott. Was anything taken out of that that you know of?

A. If that was the Bryant claim, I do; but I don't know just which one had the tunnel on it—whether the Tom Scott or the Tip Top.

Q. Do you know the character of the ore in the Tom Scott?

A. Yes sir.

Q. What sort of ore was it?

A. Carbonate ore.

Q. What did it run?

A. I don't remember now just what it did run.

Q. Do you know the Maxon claim?

A. Yes sir.

Q. What is the character of the ore in that?

A. I don't remember.

Q. Did the Tom Scott have any tunnels in it or any shafts?

A. If the Tom Scott was the claim that had the long tunnel on it, it did; but I don't know whether that was the one or not.

Q. The Maxon; how about that?

A. I don't know just how these claims laid, and I cannot tell now.

399 Q. I will read the names of the claims and ask you to tell how many of these claims, and which ones, had any development done on them: Tom Scott, Maxon, Tip Top, San Juan, Ann, Santiago, West Side, Tip Top No. 2, Gladys, Orange, Ant, Kohinoor,

International. Tell us which one of these claims had any development work.

A. The Maxon had some work on it.

Q. How much?

A. I cannot tell you—I don't remember just which one the Maxon was: and the Tom Scott.

Q. How many of them had work done on them?

A. There was work on the Maxon and work on the —. I can't remember which mine had the long tunnel on—whether the Tom Scott or the Maxon.

Q. Isn't it a fact that only two of these claims I have mentioned have ever had any development work done on them outside of the annual assessment work?

A. Two?

Q. Yes sir.

A. No, there was more work than that done on them. There was a claim down at the foot of the hill—I don't remember whether the San Juan or the Ann—one of them—that had ninety feet of shaft sunk on it; and that is more than assessment work. Then there was the claim this No. 3 shaft was on that had more than assessment work.

Q. What was the name of that claim?

A. I don't remember.

Q. Is that all the work that was done?

400 A. No. 1 had 200 feet of shaft on it.

Q. That was on the Gleason claim?

A. No sir.

Q. It wasn't on the Gleason claim?

A. No sir.

Q. You are sure of that?

A. I am pretty sure.

Q. Tell me how much development work was done on the Ann claim.

A. On the Ann? Well, if that was the one down near the foot of the hill near the office, about 100 feet of shaft work.

Q. Did you take any ore out of that?

A. No sir.

Q. Did you find any ore there at all?

A. No sir.

Q. Then what do you say that was worth—anything?

A. That was just to take up a wedged shaped piece of ground in there.

Q. Where was the No. 3 shaft?

A. It laid off to the left at the foot of the hill, going up to the hill.

Q. How much work was done there?

A. We had two pretty good big tunnels in there and quite a big shaft.

Q. Did you take any ore out of that?

A. No sir.

401 Q. Whatever was taken out is still on the dump right today, isn't it?

A. No.

Q. Any shipments made from there?

A. Yes sir.

Q. Where?

A. El Paso.

Q. Do you know what returns you got on it?

A. I do not.

Q. Do you know whether it brought the company in debt, or whether you made any money out of it?

A. No sir.

Q. What was that worth?

A. I don't remember—we shipped some pretty good ore.

Q. What kind of ore?

A. Carbonate ore.

Q. Now the other shaft—the No. 1 shaft; you say it wasn't on the Gleason claim?

A. It might have been on the Gleason claim, but I don't think it was.

Q. What work was done there?

A. They had a shaft down there about —. I don't remember whether 180 feet or 200 feet; they had a shaft there with a big tunnel in it.

Q. Did you get any ore out of that?

A. No.

Q. Not a pound of ore from there?

A. No.

Q. How do you make your estimate of a quarter of a million dollars for the value of the mines?

Mr. IVES: Half a million dollars, Mr. Goodrich.

Mr. GOODRICH: Well, half a million dollars, then.

A. We paid \$40,000 for one claim and \$30,000 for another and \$25,000 for another; and if there was anything in that country they were all prospects. We weren't developing this country; the year we got in there there was a good many mines located around there—the Pierce mine was in operation and the Great Western was working and taking out ore. Mr. Gleason was working there and shipped a good deal of ore, and the indications at that time made this country look very bright.

Q. Now, Mr. Ryan, isn't it a fact that the Pierce mine was twelve miles from there?

A. It is in that neighborhood.

Q. Isn't it a fact that the Great Western is about eight miles from there?

A. I don't think it is quite that far.

Q. Six miles then?

A. Somewhere near that.

Q. As a matter of fact, then, you just jump at the conclusion, without having discovered any particular ore, that it is worth a quarter of a million dollars?

The plaintiffs object to the question as argumentative.

The COURT: He may ask it.

A. No, I don't jump at any fact.

Q. Isn't it a fact that every pound of ore that you thought was of any value at all was shipped out of that place—out of these
403 claims?

A. No there was quite a good deal of ore in that tunnel that we didn't ship out of there.

Q. How much do you estimate in that tunnel?

A. I never measured it; couldn't tell you how much was there.

Redirect examination.

By Mr. IVES:

Q. Is the Copper Bell mining claims in that neighborhood?

A. Yes sir.

Q. State whether or not they adjoined these properties of yours?

A. They did.

Q. Did the Gleason claim—was it near these other claims?

A. Yes, it joined right on to them.

(Witness excused.)

E. B. RYAN, one of the plaintiffs, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. Mr. Ryan, you are one of the plaintiffs in this action?

A. Yes sir.

Q. Do you know Captain McKittrick?

A. I do.

Q. You were at Willcox about the 29th day of November, 1902?

A. Yes sir.

404 Q. Were you present at any conversations between Jepp Ryan and Captain McKittrick there at Willcox at that time?

A. I was.

Q. State, Mr. Ryan, what occurred at those conversations?

A. I went up to Willcox to attend the annual meeting of the Turquoise Copper Mining and Smelting Company, and after the meeting was through with there was a conversation in regard to what would become of the Turquoise Mining and Smelting Company. Jepp Ryan asked Captain McKittrick what he intended to do about the mining property. The Captain said that they had nothing to do; they were out; that we had the advantage of them and could freeze them out; that McPherson held the property in his name, practically. So then we told him there was no freeze-out at all; that we wanted to do whatever was fair and square to protect everybody, so we could all get our money back. And then we wrote up a contract—a kind of agreement—and showed it to Captain McKittrick, and he said he would not sign it, and that Mr. Tevis would not sign it because it was too much like a promissory note. Then they talked about what they would sign, or what they would do, and they talked over dividing the stock—that is, what disposition could be made of the stock. So then they agreed to change

the capital stock from 100,000 shares of the par value of \$10 per share to one million shares at one dollar per share.

Q. Was anything said as to why that should be done?

A. Well, I was coming to that.

Q. Go ahead, then.

A. That was done so as to divide the stock and give Mr. Tevis and Mr. McKittrick the control of the property. Ryan
405 brothers owned four-sevenths and they three-sevenths of the property, and the Captain said that Mr. Tevis was a very rich man—a multi-millionaire—and that he would not have anything to do with any property or go into any proposition unless they had absolute control; and for the Ryans to resign and give them enough stock so as to put them in control, then they would take hold of the proposition and try and handle it so everyone could get their money. So it was agreed then that McKittrick and Tevis should have 280,500 shares and the Ryan brothers 279,500 shares and there should be 240,000 shares put in the treasury and 200,000 shares put in McKittrick's hands as a trust fund. The 240,000 shares were to be sold and the proceeds used to pay off the McPherson judgment: the balance of the money, or the next \$20,000, was to be used in developing the property. Then the 200,000 shares were to be sold to pay all parties their original cost in the ratio of 101 to 99. So that was the understanding, and Mr. McKittrick left the hotel and he and a newspaper man, as I remember it, came back with a contract along practically those lines, and that is what we signed. They agreed to take this property and handle it for two years, and if at the end of the two years they didn't—

The Defendants object to the witness relating the contents of the contract.

The Court: I sustain the objection.

Q. State what was said when they came back with the written contract.

A. We talked it over, and Jepp Ryan told him he didn't
406 like that contract, and he said they intended to be fair with everybody, and if they didn't fulfill their part of the contract they would return our interest to us at the end of two years, the same as it was at that time.

Q. Did you sign the contract?

A. I did.

Q. When?

A. Right there—November 29th.

Q. After that did you send in your resignation as a director and officer of the company?

A. I did.

Q. After you got the resignation, state whether or not there was any delay in your signing it.

A. I don't think there was.

Q. When did you first hear of the suit brought by the Western Company against the Turquoise Copper Mining and Smelting Company in Kern County, California?

A. I might have heard of it, but I didn't know anything about it for sure until last July.

Q. Where?

A. In Tombstone.

Q. What was your purpose in being at Tombstone last July?

A. Interested in this suit.

The defendants object to the question and ask that the answer be stricken out.

The COURT: It may stand.

Mr. GOODRICH: The defendants except to the ruling of the Court.

407 Q. State what was the first time you heard of the suit brought in Cochise County by the Western Company against the Turquoise Company.

Mr. GOODRICH: We want to make the same objection to this line of questions as we made a while ago, because it was not the duty of defendants to notify them.

The COURT: I overrule the objection. In overruling the objection, however, I do not hold that it was the duty of the defendants to notify the plaintiffs, but that it is proper evidence under some—

A. I could not answer that positively.

Q. Who did you hear about it from?

A. Through Jepp Ryan.

Q. Who of you three brothers had charge of the transactions in connection with this Turquoise property?

A. Jepp Ryan had charge of it.

Q. Did you attend to any of these matters personally?

A. No sir.

Mr. GOODRICH: No cross-examination.

(Witness excused.)

P. B. Soto, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. What is your full name?

A. Pablo B. Soto.

Q. What is your business, Mr. Soto?

A. Merchant—general merchandise.

Q. Where do you reside?

408 Willcox, Arizona.

Q. Do you conduct your business?

A. Yes sir.

Q. Do you know Captain McKittrick?

A. Yes sir.

Q. Do you know the Ryans, the plaintiffs in this case?

A. Yes sir.

Q. Do you know the Turquoise Copper Mining and Smelting Company?

A. Yes sir.

Q. Did you ever hold any office in the Turquoise Copper Mining and Smelting Company?

A. Yes sir.

Q. What was it?

A. Secretary and Treasurer.

Q. How long were you secretary and treasurer?

A. Something like thirty-three or thirty-two months.

Q. Did you own any stock in that company?

A. Yes sir.

Q. Did you own any stock prior to November 29th, 1902?

A. Yes sir.

Q. And on that day?

A. Yes sir.

Q. Since then?

A. No sir.

Q. Were you present—Where were you on the 29th of November, 1902?

A. At the Willcox House at the regular company meeting:
409 it was a postponed meeting, I think.

Q. Who did you see there at that meeting?

A. Captain McKittrick was there and the three Ryan brothers.

Q. Did you ever see this contract that is attached to the complaint, between Captain McKittrick, Mr. Tevis and the Ryan Brothers?

A. I believe I heard it read.

Q. When?

A. At Willcox.

Q. Were you present at any conversations with respect to this contract?

A. I was present at the time the contract was made and signed.

Q. You mean at the time it was actually signed?

A. Actually signed, yes sir.

Q. By the Ryan brothers and Captain McKittrick?

A. Yes sir.

Q. That contract was prepared when you first had any conversation with respect to it?

A. No sir, it hadn't been prepared: I think it was prepared after we had the regular company meeting.

Q. Were you present at the conversation between Captain McKittrick and the Ryans, or any of them, about this contract—about its preparation?

A. Yes sir, I was.

Q. State what occurred at those conversations.

A. I was present at the conversation had by them, but I
410 don't remember the facts—what the agreement was as to the contract to be drawn; but after we had the meeting I believe Captain McKittrick and Mr. Anderson (I think that's the man's name) he is a printer and an attorney—he came up with this contract where we were having the meeting and the contract was read, and I believe some objection was made by the Ryan brothers to the contract about giving the control of the property to Mr. Tevis, and the Captain said that Mr. Tevis was a very responsible man,

being a very rich man, and that he would not have anything to do, or sign any contract, or have anything to do with any property except he had full control, and it was then agreed——

The defendants object to the witness stating what was agreed.

The WITNESS (continuing before the Court rules): The contract was agreed to——

Q. Had the contract been prepared then?

A. Yes sir. I believe the first contract they prepared was not accepted, and they drew the second one, and the second was accepted and signed, as I understand—I know it was: I saw it signed.

Q. Prior to the signing of this second contract, and at this conversation, do you remember whether anything was said with respect to what would take place if the stock was not sold?

A. There was an agreement——

Mr. GOODRICH: Don't tell what the agreement was.

Q. What was said orally?

411 A. It was said by Captain McKittrick, if I remember, that if this certain amount of treasury stock was not sold within a certain time—I believe two years—if it wasn't sold the Ryan brothers would be reinstated and placed back in the same position where they were before signing the contract.

Q. After this conversation did you continue to be secretary?

A. I did, I believe, for a few days. I either put in my resignation then—I was asked to put in my resignation—or a few days after: I don't remember which.

Q. Did you ever, subsequent to that, have any conversation with Captain McKittrick as to your stock in that company?

The defendants object to the question on the ground that it is immaterial.

The COURT: You may state whether or not you had the conversation. The question is whether you did have any conversation or not.

A. Yes sir.

Q. What was that conversation?

The defendants object to the question on the ground that it is immaterial.

Mr. IVES: I will withdraw the question.

Q. Prior to this contract of November 29th, 1902, had you had any business relations with the company other than as its secretary?

A. Secretary and treasurer—yes sir, I disbursed all the money for them.

412 Q. What moneys did you disburse?

A. Something like \$160,000—I could tell exactly if I had my letter press book.

Q. Have you it with you?

A. Yes sir, at the hotel.

Q. If the other side wish it will you produce it?

A. Yes sir.

Q. You disbursed the money for the corporation?

A. Yes sir.

Q. Was that money repaid to you?

A. It was paid to me, yes sir.

Q. In what way?

A. At a request on the foreman—he would notify me about what amount was required—

The defendants object to the question on the ground that it is immaterial. I don't see what bearing it has on this question.

Mr. IVES: It shows the general course of business.

The COURT: I sustain the objection to his going into the detail of it. I think it would be proper to show what proportion the money was furnished.

Q. If you know, state in what proportion these moneys were furnished to you by Tevis and McKittrick on the one hand and the Ryans on the other.

A. Captain McKittrick and Mr. Tevis owned three-sevenths and the Ryans four-sevenths.

The defendants object and ask to have the answer stricken out as not responsive.

413 Q. I did not ask what proportion they owned, but in what proportion the money was repaid to you.

A. In the proportion of the number of shares they owned in the company.

Q. Do you know what that proportionate ownership was?

A. Yes sir, I know about; I think two of the Ryans owned fourteen thousand and some shares—

Q. The general proportion as to what the Ryans owned and Tevis and McKittrick owned was what?

A. Four-sevenths and three-sevenths.

Q. Do you reside now at Wilcox, Mr. Soto?

A. Yes sir.

Q. Do you know who is running the property now?

The defendants object to the question on the ground that it is immaterial.

Mr. IVES: We wish to show that McKittrick's ownership and control remain the same in spite of the execution sales.

The COURT: I think it is within the issues as defined by the pleadings.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Q. Do you know who is operating these properties now that were owned by the Turquoise-Copper Mining and Smelting Company?

A. I believe McKittrick is—that is my understanding.

Mr. GOODRICH: We object; you say that is your understanding.

Q. Do you know?

A. I have been told.

414 The defendants now ask that the question and answer be stricken out, the information of the witness being hearsay only.

Q. Did you ever have any conversation with McKittrick on the subject?

A. No sir.

The COURT: Your knowledge is through what someone told you?

A. Yes sir.

The COURT: Strike it out then.

Mr. IVES: Has the management of these properties been doing any business with you recently?

A. Not recently, no sir.

Q. How long since?

A. It has been over two years since they did any business with us.

Q. After this execution sale—Do you remember the time these properties were sold at execution?

A. Yes sir.

Q. After that time did the management of those properties transact any business with you?

A. Yes sir.

Q. Who represented the properties during such management?

A. Captain McKittrick.

Q. What was the nature of the business? Did you furnish supplies?

A. Yes sir.

Q. Who paid for them?

415 A. The company furnished it.

Q. I mean after the execution sale—what individual?

A. After the execution sale I believe they continued to furnish the money for some time in the same proportion—four-sevenths and three-sevenths—for some time after the execution: that is my recollection.

Q. What execution sale do you mean?

A. The Si Bryant.

Q. Oh, I misunderstood you: I didn't mean that: I mean after the properties were sold out by the Western Company—did they continue after that?

A. No sir.

Cross-examination.

By Mr. GOODRICH:

Q. You say this \$160,000 you speak of was paid in in the proportion of three-sevenths and four-sevenths—three-sevenths by McKittrick and Tevis and four-sevenths by the Ryans. Who paid you that money?

A. It was sent directly by Tevis and McKittrick and the Ryans; they would send a check whenever I made an assessment on them: I made an assessment on each one of the directors for their pro rata.

Q. On each one of the directors?

A. Yes sir; the stockholders.

Q. Who sent you the money?

A. The stockholders—McKittrick, Tevis and the Ryans.

Q. Did you get any money from the Ryans?

- A. I got it for the use of the company?
- 416 Q. Did you get any money from the Ryans?
- A. I got money for different purposes.
- Q. Did you get any money from the Ryans?
- A. For what purpose?
- Q. All that \$160,000.
- A. I didn't get any myself.
- Q. Did they send you a check for any?
- A. Yes sir.
- Q. The Ryans themselves?
- A. Yes sir, the Ryans themselves.
- Q. How much did they send you after that sale?—after the Si Bryant sale?
- Mr. IVES: He is not talking about that.
- A. They continued to send me the regular assessment after that.
- Q. Who?
- A. The Ryans.
- Q. Did they send you a check individually?
- A. Yes sir, individually.
- Q. When?
- A. After that Si Bryant sale.
- Q. Wasn't it the Turquois Company that sent you the check?
- A. No, they made their own check.
- Q. Where from?
- A. Leavenworth, Kansas.
- Q. And they send you four-sevenths of \$160,000?
- A. No, not four-sevenths of \$160,000; they sent what was required of them, at that time.
- 417 Q. You stated there was about \$160,000 sent you.
- A. Yes sir, altogether.
- Q. What proportion of that \$160,000 did the Ryans individually send you?
- A. About four-sevenths.
- Q. How long did they continue sending you that four-sevenths?
- A. Up to the time we had that last meeting at the hotel.
- Q. The 29th of November, 1902?
- A. Yes sir.
- Q. Did they ever send you a cent after that?
- A. No sir.
- Q. Do you know what that money was sent to you for?
- A. What money?
- Q. The \$160,000.
- A. To be expended on the work.
- Q. Do you know that was expended, most of it, on the Gleason mines?
- A. It was expended on property that was under bond to the company at the time.
- Q. How do you know that?
- A. I saw all the papers to get the bonds on them.
- Q. Did you see any papers stating that the money was expended on any particular mine?

A. No sir.

Q. How do you know then that it was, and what it was for?

A. The money was being spent out there, as I understand.

Q. I don't want to know what you understand: I want to
418 know what you know. Do you know any of — was spent
out there or what mine spent on?

A. The foreman made demand on me every month for what
money was required for their mines.

Q. Do you know that is was expended on the mines—of your own
knowledge?

A. Yes sir.

Q. Of your own knowledge?

A. Of my own knowledge.

Q. Who did you pay it to?

A. The foreman drew checks on our firm at Pearce.

Q. What for?

A. Day laborers.

Q. Do you know that the men who got the checks labored on
those mines?

A. I know some of them.

Q. Know that they labored on those mines?

A. Yes sir.

Q. Did you see them?

A. Yes sir.

Q. What mines did they labor on?

The plaintiffs object to the question as immaterial: he was treasurer of the company.

The Court: I understand counsel is trying to prove that they money was spent on the mines. If he thinks it is important, he may go ahead.

Q. Do you know of your own knowledge that that money was
spent on any particular mine, or on any one of these mines
419 mentioned in this complaint?

A. Not on any particular mine, but on all the mines in
general.

Q. Do you know of your own knowledge, now, that it was expended on all the mines in general?

A. If the people out there were acting in good faith, it was.

Q. I am asking what you know of your own knowledge; not what someone told you.

A. Captain McKittrick ought to know.

Q. That is not the question; I am asking if you know that any of that money was spent on the mines?

A. Yes sir, I know it was.

Q. Do you know the money was spent in paying the men for the particular work you saw?

A. Yes sir.

Q. How do you know?

A. The foreman drew the checks on our firm there against money deposited with the treasurer.

Q. Do you know for what the checks were drawn?

A. For labor, as I understand it.

(Witness excused.)

Mr. IVES: This is the minute book of the Turquoise Copper Mining and Smelting Company. I offer this book in evidence: each party can read what portions as he wishes of it.

Mr. GOODRICH: I want to know what parts of it you offer.

Mr. IVES: I am willing to offer the whole book.

Mr. GOODRICH: I don't care what you offer; but I want to
420 know what it is.

Mr. IVES: I offer the whole book. As I understand, Mr. Goodrich, you have copies of these minutes, and I shall read to the jury such portions as I think advisable, and I shall also read such portions as you wish to be read, and you have copies that can be supplied to the Clerk.

Mr. GOODRICH: We agree that we can substitute copies for the originals.

The COURT: Let the minute book be received in evidence and marked exhibit B.

(Thereupon the minute book of the Turquoise Copper Mining and Smelting Company is received in evidence and marked Plaintiff's exhibit B, by the Clerk.)

Mr. IVES: First I will read from the stockholders' meeting of the Turquoise Copper Mining and Smelting Company held at the office of the company at Wilcox, Cochise County, the 29th of November, 1902, in which they passed the resolution amending the articles of incorporation by changing the capital stock from 100,000 shares of \$10 per share to 1,000,000 shares at \$1. per share. Pages 31 and 32. I then read from page 33—

Mr. BAKER: One moment: are you going to read all that?

Mr. IVES: I don't care to read it all: I will state the purport, which I think will be satisfactory.

Mr. BAKER: Please state the president and directors.

Mr. IVES: President Jepp Ryan in the chair: on motion of Mc-Kittrick, seconded by T. C. Ryan, the articles of incorporation are amended to read as follows: Signed by Jepp Ryan, President,
421 P. B. Soto, Secretary. Now I read from a special meeting of the stockholders, page 33, held at the First National Bank, Bakersfield, California, the 26th of January, 1903, pursuant to call and signed in writing by all the stockholders of the corporation. (Reads from minutes.)

Mr. IVES: I call upon you gentlemen to produce the resignation of Mr. Soto: it does not appear in the minutes.

Mr. GOODRICH: As Secretary and Treasurer?

Mr. IVES: Yes sir.

Mr. GOODRICH: There is no question about it: we do not make any question about it, and if you want it we will try to get it.

Mr. IVES: We would like to have it if you have it. (Continues to read from minutes.)

Mr. GOODRICH: If the Court pleases, we want that book, and by agreement I suppose we can substitute copies.

Mr. IVES: Certainly.

The COURT: Very well.

Mr. IVES: You will admit the resignation of Soto, then, under date of December 11th, 1902?

Mr. GOODRICH: The 26th day of January, 1903.

Mr. IVES: Before that: you had it on December 11th, 1902.

Mr. GOODRICH: It was filed January 26th, 1903, Mr. Ives.

Mr. IVES: I offer it in evidence.

The COURT: The resignation of Mr. Soto may be received in evidence and marked Plaintiff's exhibit C.

(Thereupon the resignation of Mr. Soto is received in evidence and marked plaintiff's exhibit C by the Clerk.)

422 Mr. IVES: Dated December 11th, 1902, as Secretary and Treasurer.

Mr. GOODRICH: And I offer the file mark of January 26th, 1903.

(Thereupon plaintiffs' counsel continues reading from the minute book.)

Mr. IVES: Now we put in both these judgments. If it please Your Honor, I would like to ask each of the Ryans one question that I neglected to ask. Mr. Jepp Ryan, when did you first hear of the judgment of McKittrick against the Turquoise Copper Mining and Smelting Company?

Mr. JEPP RYAN: In June, I think, 1905.

Mr. GOODRICH: Let him take the stand, will you please.

The COURT: Come around here, Mr. Ryan.

JEPP RYAN, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Mr. IVES: Mr. Jepp Ryan has already answered it: the McKittrick judgment—the execution under that—was advertised and he heard that at the same time.

The COURT: That is before the judgment was given.

The WITNESS: That is, notice of the Sheriff's sale.

The COURT: That was your first notice of it?

The WITNESS: Yes sir.

The COURT: When was that judgment?

Mr. NEALE: The judgment was July 20th, 1905.

The COURT: He could not have learned of the advertisement of the sheriff's sale if the judgment did not come until a month after.

423 Mr. NEALE: He states his information was that contained in the notice of the sheriff's sale.

The COURT: How could that be if there was no sheriff's sale.

Mr. NEALE: He is simply wrong in the month.

Direct examination by Mr. IVES:

Q. When you first heard of this judgment was when you got notice of the sheriff advertising the property for sale under this judgment: is that right?

A. Yes sir.

Cross-examination.

By Mr. GOODRICH:

Q. When was that?

A. I will say that it was June or July, 1905: I have the slips there but I don't remember the exact date.

Q. It was after that judgment was rendered on July 20th, 1905, was it?

A. Yes sir.

Q. It was the advertisement of the sale of the property under that judgment?

A. Yes sir.

Q. What became of your stock, Mr. Ryan?

A. I put it up in the First National Bank as collateral for a loan.

Q. Have you ever gotten it back?

A. No sir.

Q. Have you ever paid that?

The plaintiffs object to the question as immaterial.

424 The COURT: It is certainly not cross-examination: it is part of your own case.

Mr. GOODRICH: If I can show that he is not interested in that stock at all, it seems to me he has no case.

Mr. IVES: If you had pleaded it you might.

Mr. GOODRICH: I waive it as cross-examination and ask him as part of my case.

Mr. IVES: Then I do object to it at this time.

Mr. GOODRICH: Very well, I will ask it later on.

(Witness excused.)

T. C. RYAN, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. IVES:

Q. Mr. Ryan, when and from whom did you first hear of the McKittrick judgment?

A. From Jepp.

Q. Do you remember when you first heard it?

A. No, I do not.

(Witness excused.)

E. B. RYAN, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. IVES:

Q. Mr. Ryan, when did you first hear of the McKittrick judgment?

A. From Jepp.

Q. Don't remember when you first heard it?

A. No sir.

(Witness excused.)

425 Mr. IVES: I now offer in evidence the judgment roll in the case of the Western Company against the Turquoise Copper Mining and Smelting Company brought in the District Court of the County of Cochise.

Mr. GOODRICH: What is the date of that?

Mr. IVES: The complaint was filed the 20th of June, 1905; H. L. Pickett, attorney for plaintiff. I think Mr. Bowman will admit here that Pickett is the partner of Bowman and Pickett retained by the Turquoise Company. That is admitted is it not?

Mr. GOODRICH: Yes sir.

The COURT: Is there any objection to the judgment roll?

Mr. GOODRICH: I haven't seen it; I don't know. (After examining the judgment roll.) No objection.

The COURT: Mark it plaintiff's exhibit D.

(Thereupon the judgment roll in the case of the Western Company against the Turquoise Copper Mining and Smelting Company is received in evidence and marked plaintiff's exhibit D. by the Clerk.)

Mr. IVES: I won't read that to the jury. Now I offer the judgment roll in the McKittrick judgment — both in Arizona.

Mr. GOODRICH: We object to that as immaterial to any issue in this case — irrelevant and incompetent.

The COURT: I overrule the objection so far as the materiality is concerned; I do not know whether it is incompetent.

Mr. GOODRICH: I don't think it cuts any figure in the final wind-up.

The COURT: So far as the materiality is concerned I will
426 let it be introduced in evidence; but so far as the incompetency is concerned, I don't know.

Mr. IVES: It is a certified copy.

The COURT: Let it be received in evidence and marked Plaintiff's exhibit E.

(Thereupon the judgment roll in the case of McKittrick against the Turquoise Copper Mining and Smelting Company is received in evidence and marked Plaintiff's exhibit E by the Clerk.)

Mr. IVES: This is the judgment for \$9,975.00 claimed by McKittrick against the company, July 20th, 1905.

The COURT: What is the date of the other one—the judgment in the Western Company case?

The CLERK: Filed July 20th, 1905; dated the 20th of July, 1905.

The COURT: Both granted the same day, then.

Mr. IVES: Yes sir. I now offer in evidence the execution and return on the Western Company judgment.

Mr. GOODRICH: All right.

The COURT: Let it be received in evidence and marked plaintiff's exhibit F.

(Thereupon the execution and return on the Western Company judgment is received in evidence and marked plaintiff's exhibit F by the Clerk.)

Mr. IVES: This Sheriff's return in the Western Company judgment shows that on the 12th of August, 1905, he sold the properties described in the complaint to the Western Company, a corporation, for the sum of \$45,855.30, and the other one shows—

427 The COURT: You offer this as the execution on the McKittrick judgment?

Mr. IVES: Yes sir.

The COURT: Let it be received in evidence and marked plaintiff's exhibit G.

(Thereupon the execution and return on the McKittrick judgment is received in evidence and marked plaintiff's exhibit G, by the Clerk.)

Mr. IVES: This one shows that he sold under the execution upon the McKittrick judgment—that he sold the property to the Western Company for \$10,406.00.

The COURT: The same date?

Mr. IVES: Same date. I now offer a certified copy of the deed from the Sheriff to the Western Company.

Mr. GOODRICH: No objection.

The COURT: Let it be received in evidence and marked plaintiff's exhibit H.

(Thereupon the certified copy of the deed from the sheriff to the Western Company is received in evidence and marked plaintiff's exhibit H by the Clerk.)

Mr. IVES: I next offer in evidence a certified copy of the articles of incorporation of the Tejon Mining Company.

Mr. GOODRICH: No objection.

The COURT: Let it be received in evidence and marked plaintiff's exhibit I.

(Thereupon the articles of incorporation of the Tejon Mining Company—certified copy—are received in evidence and
428 marked plaintiff's exhibit I by the Clerk.)

Mr. IVES: This appears that on the 18th day of July, 1906, William S. Tevis, W. H. McKittrick, F. S. Rice, J. N. Shornenback, and E. D. Buss—(I will add here that I didn't read in the directors' meetings that it was signed by J. N. Shornenback.) This corporation organized by Tevis, McKittrick, Rice, Shornenback and E. D. Buss, under the laws of Arizona, acknowledged before the notary public in the County of Kern, State of California—principal place of business at Gleason in Cochise County, Arizona—

Mr. GOODRICH: What is it organized for?

(Thereupon plaintiff's counsel reads from exhibit I.)

Mr. IVES: I now offer in evidence the deed dated the 20th of July, 1908, from the Western Company to the Tejon Mining Company, conveying these properties that were sold to the Western Company under the execution, and formerly were the properties of the Turquoise Copper Mining and Smelting Company. Is there any objection to that deed, Mr. Goodrich?

Mr. GOODRICH: I am thinking about it: No, let it go in.

The COURT: Let it be received in evidence and marked exhibit J. (Thereupon the deed from the Western Company to the Tejon Mining Company is received in evidence and marked plaintiffs' exhibit J by the Clerk.)

CHARLES M. REYNAUD, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. Your full name, if you please,

429 A. Charles M. Reynaud.

Q. Mr. Reynaud, where do you reside?

A. At Pearce, Cochise County, Arizona.

Q. You know these properties owned by the Turquoise Copper Mining and Smelting Company?

A. Yes sir.

Q. They are about how far from Pearce?

A. About thirteen miles south.

Q. What is your occupation at Pearce?

A. Merchandising.

Q. Have you in your business of general merchandising had any dealings with the Turquoise Copper Mining and Smelting Company within the past few years?

A. Yes sir.

Q. Until how recently have you been conducting business with the parties operating these mines?

A. Doing it today.

Q. You have been continuously for how long?

A. Six or seven years.

Q. Please state who has been conducting the business with you in behalf of these properties for the past two years.

The Defendants object to the question as irrelevant and immaterial.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. The business has been done with Captain McKittrick or his representative.

430 Q. Right up to the present date?

A. Yes sir.

Q. Continuously for the last two or three years?

A. Yes sir.

Q. Have you had any conversation recently with Captain McKittrick with respect to the ownership of those claims?

Mr. GOODRICH: When?

Mr. IVES: Recently: I will locate the date.

A. Yes sir.

Q. Any conversation in which he said anything about the ownership of the claims?

A. Yes sir.

Q. When did you have such conversation—the most recent one?

A. The first of December.

Q. Of what year?

A. This year.

Q. Where did that conversation take place?

A. On the train between Cochise and Pearce.

Q. What did he say in that regard?

The Defendants object to the question on the ground that title cannot be proven by the declaration of any one.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. The Captain told me that he was the owner of the Tejon Company now and that he was running the business himself.

Q. And the business which you had with the management
431 of these mines, is it conducted with a corporation, and if so what is the name of the corporation?

A. It goes under the name of the Tejon Mining Company.

Mr. GOODRICH: No cross-examination.

(Witness excused.)

B. A. TAYLOR, called as a witness in behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. Your full name, Mr. Taylor.

A. B. A. Taylor.

Q. Where do you reside, Mr. Taylor?

A. Gleason, Arizona.

Q. What is your business?

A. Merchandise.

Q. How long have you resided there?

A. Eight years tomorrow.

Q. Do you know Captain McKittrick?

A. Yes sir.

Q. Do you know the properties that belonged formerly to the Turquoise Copper Mining and Smelting Company?

A. Yes sir, I know where it is at.

Q. Have you conducted any business with the management of those properties recently?

A. We have done a little business all along during eight years, you might say.

Q. With whom did you conduct that business?

A. Captain McKittrick's representative, Mr. Thiers.

Q. Up to what time?

432 A. Just a short time ago; in fact every month a little business—not a great deal, but a little.

Mr. GOODRICH: No cross-examination.

(Witness excused.)

S. H. BRYANT, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. What is your full name, Mr. Bryant?

A. Silas H. Bryant?

The COURT: Will this witness probably take some time?

Mr. IVES: Probably some little time.

The COURT: We will suspend here, then. Gentlemen of the jury, be careful not to talk about the case to anyone during the interval, or let anyone talk to you about, and do not form or express an opinion about it until it is finally submitted to you. We will take up the case again at half past nine o'clock tomorrow morning.

(Thereupon Court adjourns.)

TUESDAY, December 22nd, 1908.

(Court being opened at 9:30 A. M. pursuant to adjournment, thereupon the said jurors are called by the clerk, all answering to their names and all being present in the jury box.)

S. H. BRYANT, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination resumed by Mr. IVES:

Q. Where do you reside, Mr. Bryant?

A. Really in California now.

433 Q. Are you the S. H. Bryant who was the plaintiff in a suit against the Turquoise Copper Mining and Smelting Company in the year 1902?

A. Yes sir.

Q. Do you know Captain McKittrick, Mr. Bryant?

A. Yes sir.

Q. And you knew him prior to the commencement of that suit?

A. Yes sir.

Q. And you knew the Ryans, plaintiffs in this action?

A. Yes sir.

Q. Prior to the commencement of that suit did you have any conversation with Captain McKittrick with respect to a note of the Turquoise Copper Mining and Smelting Company which you held and upon which you brought that suit?

A. Yes sir.

Q. Please state what the conversation was and where it took place.

The defendants object to the question as irrelevant and immaterial to any of the issues here.

The Court: Is this in reference to a note Mr. Bryant had?

Mr. IVES: We wish to show the purpose of the defendants at that time—to have the Ryans sold out.

The defendants object to counsel making any statement to the jury as to what the purpose was: there is no allegation in the complaint: there is no such testimony.

Mr. IVES: This all tends to corroborate the allegations of fraud: that is, we claim, strongly corroborative of these allegations.

434 The COURT: I do not see any allegation that covers that.

All your allegations of fraud have reference to actions taken after the time which you put them into possession.

Mr. IVES: My information is that the inference from the acts done afterwards would be maintained by this evidence showing the intent: that these acts done afterwards were done in furtherance of a plan conceived prior to this judgment.

The COURT: There is no allegation of that kind—no allegation that would indicate that there was any pre-conceived plan—and I think you would be taking the defendants at a disadvantage without some such allegations in the complaint. I will sustain the objection.

Mr. IVES: The plaintiffs except to the ruling of the Court. The plaintiffs offer to prove by this witness—

The defendants object to plaintiffs' counsel making any statement of what they offer to prove by this witness, in the presence of the jury.

Mr. IVES: I will not make a further statement now, but would like to make an offer in order to preserve our rights on the record.

The COURT: Better make a note of it, then, and make it when the jury is sent out.

Mr. IVES: I will do that.

Q. Mr. Bryant, you owned some of these mines mentioned in the complaint?

A. Yes sir, three of them.

Q. About that time what had been your business, Mr. Bryant?

A. Mining.

435 Q. For how long?

A. I commenced mining about 1871.

Q. What, in general, was your experience in mining, and has been since 1871?

A. Well, as a practical miner I had mined all over the country, you might say, from Montana down: I mined in all the states.

Q. Had you had experience in buying and selling mines?

A. Some, yes sir.

Q. Were you familiar with these particulars mines mentioned in this complaint—that group owned by the Turquoise Copper Mining and Smelting Company?

A. Yes, I had worked there in that camp for nearly twenty years.

Q. Are you familiar with the mines in the vicinity of these mines mentioned in this complaint?

A. Yes sir.

Q. The Copper Bell mines adjoining them?

A. Yes sir.

Q. Do you know, Mr. Bryant, what was the value of these mines alleged in this complaint in November, 1904?

A. Yes sir.

Q. What was the value of these mines at that time?

The defendants object to the question on the ground that the witness has not qualified himself to answer. He said he knew about mines in the neighborhood of the Copper Bell mines, but he has not stated that he knew anything about these particular claims.

436 Mr. IVES: I will ask him.

Q. Are you familiar with these particular claims mentioned in the complaint?

A. Yes sir.

Q. Now I repeat: what was the value of these mines mentioned in the complaint as of November, 1904?

The Defendants object to the question on the ground that he has not stated any facts alleging that there is any development work there.

The COURT: I should think that, prima facie, he has qualified to testify as to the value: if you wish to examine him as to his qualifications I will allow you to do so; otherwise I shall overrule the objection.

Mr. GOODRICH (examining the witness):

Q. You say you know these particular claims, Mr. Bryant?

A. You mean the ones——

Q. Mentioned in that complaint.

A. Yes sir.

Q. Do you know the names of them?

A. Of about six of them: the three I sold and the three that Casey sold: these others I don't know so much about as the others.

Q. What work has ever been done on any of these six claims that you know of?

A. I worked the Tom Scott for about four years steady: that is, approximately: but I worked from five or six men to thirty men, I think.

Q. All on the Tom Scott?

437 A. Yes, I only worked on the Tom Scott.

Q. Now, what development work was done on the Tom Scott to show that there was a mine there?

A. There was two or three separate shafts on it—there was one cline and shaft that connected with the tunnel—I don't know the depth now, but somewhere in the neighborhood of 200 feet. Then there was a tunnel in the neighborhood of 1,000 feet.

Q. What did you find in that Tom Scott mine?

A. Well, it is a good while since I worked that, but I shipped ore

enough to pay the working expenses and at one time I was some twelve thousand dollars ahead.

Q. How long did you work it? Did it take you four years to realize a thousand dollars' profit?

A. No, I had lived off it and had about \$12,000 net actually during that time—that would be about the profit during that time.

Q. You say you took \$12,000 of ore out of it?

A. I took more than that—perhaps fifty or sixty thousand dollars of ore—maybe one hundred thousand.

The plaintiffs object to defendants' counsel pursuing the examination along these lines on the ground that it is not proper examination on the question under consideration.

The COURT: You should confine your questions now as to whether he is competent to testify: I am allowing you to examine to find out whether or not he is competent to testify; not what the values are.

Q. As a matter of fact, didn't you ship out every dollar's
438 worth of ore that you took out of that mine?

The plaintiffs object to the question on the ground that it is not proper under the examination which counsel is conducting at this time.

The COURT: I sustain the objection.

Q. Well, the other mines; what did you do with them?

A. Done the assessment work on them to hold them from year
to year.

Q. Is that all?

A. Yes sir.

Q. They are not developed mines, then?

A. Not at the time I sold them.

Q. Not at the time you knew them?

A. Not at the time I sold them.

Q. What year did you sell them?

A. I think in 1900; but I won't be sure about that.

Q. You sold three claims to whom?

A. To the Ryan brothers and McKittrick.

Q. For what price?

The plaintiffs object to the question as irrelevant and immaterial.

The COURT: I sustain the objection. You are not examining as to the value of these mines now, you are only examining as to whether this man is qualified to testify.

Q. How about the other three, the Casey claims that you say you don't know what was done with them?

A. There were shafts on them—one I think about sixty or seventy feet—and other work done on them. The main Casey claim lay
439 right south from the one I worked on, and I used to see him working on it, but I never paid much attention to it.

Q. You didn't know anything about that?

A. Yes, something.

Q. Did you know something of the ore?

A. All the ore above the surface is carbonate ore.

Q. The three Casey claims?

A. There is not much ore on it but the one.

Q. When were you there and examined them?

A. You mean the last time?

Q. Prior to 1904?

A. I was up over Casey's ground with him about the time we made the bond in 1900; then I have been over the claim at different times since.

Q. On or about prior to the 29th of November, 1904—1902—when were you there?

A. I was out there off and on; I didn't live there at the time.

Q. Did you know anything about the condition of the ore in 1902, November, and prior to that time?

A. Just before I brought that suit (I don't know what date it was) I was there and went over all the mines.

Q. You don't know when that was?

A. It is a matter of record when I brought the suit.

Q. You cannot say?

A. No, but I think it was 1902.

Redirect examination resumed by Mr. IVES:

440 Q. What was the value of that group of mines mentioned in that complaint in November, 1904?

The Defendants object to the question; counsel stating that he desires to make the same objection as before, viz.; that the value of the mine is not the basis on which a suit is brought, but the value of the stock. Of course you have ruled, but I want to make the formal objection.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

The COURT: You may answer the question.

A. About \$400,000, I would think.

Q. That is the whole of these claims that you know—\$400,000?

A. Yes sir.

(Witness excused.)

Mr. IVES: I want to ask just one more question.

Mr. GOODRICH: I want to ask another question also.

Mr. IVES: Go ahead.

S. H. BRYANT, recalled as a witness for the plaintiffs, testifies as follows:

Cross-examination by Mr. GOODRICH:

Q. What did you sell your three claims for?

The plaintiffs object to the question as immaterial.

The COURT: I overrule the objection. You may answer.

A. I got \$40,000 for them.

Q. What is the comparative value between the three claims you sold and the value of the other three claims—the Casey claims?

The plaintiffs object to the question as immaterial.
441 The COURT: I overrule the objection.

A. I think Casey's claims maybe is worth more the way the camp is developing; but I never did think that I got the worth of mine.

Q. That don't make any difference; I ask that that part be stricken out.

The COURT: Strike it out as not responsive.

Q. You say you think the three Casey claims are worth more than your claims?

A. Yes, in 1904.

Q. How much more?

A. I could hardly say; the property is pretty near the same and one would be worth about as much as the other.

Q. On what do you base your valuation of \$400,000?

A. On the way the property was selling at; what the stock was worth in the Copper Bell about that time (I don't remember the date exactly,) and the amount of ore in sight in these adjoining claims.

Q. You take the Copper Bell stock, then, and the valuation of the Copper Bell mines as a basis on which to make your estimate?

A. It was better developed as far as copper is concerned.

Q. Then do you base your valuation of these properties on development work done in the Copper Bell claims?

A. To a certain extent.

Q. Do you know what amount of development work was done in the Copper Bell claims?

A. I could not draw a map of it, but I was down through
442 the claim at that time and looked it over.

Q. You do not say any great amount of development work was done on these claims?

A. No, there had been some little work on the Tom Scott after I sold it—that is, in 1902.

Q. Any work done on the balance of the claims?

A. Yes, some done on the Maxon; but I didn't go down in the Maxon, so I don't know.

Q. Do you know whether any bodies of ore were exposed in any of these other claims?

A. Some ore came out of the Maxon, but I don't know the value.

Q. You don't know the value?

A. No.

Q. Have any assay made?

A. No.

Q. Do you know whether any ore was exposed in any of these claims except the Tom Scott?

A. No—yes there was, I think, in the Casey property.

Q. How much?

A. I didn't measure it; I just saw it on the ground.

Q. Whereabouts in the Casey property?

A. Well, it would be near—I might be wrong about the Casey property; it would be along the line of the Gleason property, and I thought the shaft was on the Casey property.

Q. Was there any considerable body of ore exposed or blocked out in any of these mines?

A. Not that I know of, except the one I was down in.

443 Q. That is the Tom Scott?

A. Yes sir.

Q. How much ore was exposed or blocked out in the Tom Scott?

A. Well, there wasn't a great deal. When I was down they had sunk a shaft at the mouth of the tunnel and it showed very well—they were taking out some ore from it; and up at one place further north on the claim they had done quite a bit of work: there wasn't a great deal in sight.

Q. Was any of that ore such ore as could be shipped for profit?

A. Yes sir.

Q. As I understand you, you base your valuation of \$400,000 on surrounding conditions and the amount the stock of the Copper Bell Mining Company was selling for?

A. Not so much the value of the stock as the value of the mine—the amount of ore in sight in the Copper Bell.

Q. You draw the inference that the same amount of ore would be found in these other claims?

A. Yes; that is, I think there would be more ore.

Q. You think there would be more?

A. Yes, the trend of the ore would be that way and that is what I compute the value on.

Q. But you don't know that to be the fact?

A. No.

Q. You don't know whether there is any ore of any commercial value in any of these claims?

A. Yes, there is some.

444 Q. Not \$400,000 worth?

A. No, not that much in sight.

Q. How much was there in sight?

A. I could not answer that question with any intelligence at all, for when I worked the mine I kept up with the trend of the ore all right but had to judge it by what I had done when I worked the mine; and while I had shipped a good deal of copper ore, I didn't get pay for copper. Usually I didn't ship for copper, but I know some ran high for copper. I never made but one shipment that I got copper out.

Q. It very often happens in mining claims that there is a fault and you lose the body of ore altogether, don't you?

A. Yes.

Q. Do you know whether there is any faults over there or not?

A. No, I don't.

Q. Then the basis of your estimate is simply based on the proposition that the ore found in the Copper Bell Mining Company's claim will extend to these other claims, and that there will be no fault or anything of that kind?

A. Yes; as a practical miner I would not be afraid to sink a shaft on my own money to catch that ore: I believe it is there.

Q. Do you mean by saying that it is worth \$400,000 that that

would be \$400,000 cash or working bonds, or something of that kind?

A. Well, I don't know how to answer that question: I think it would be worth \$400,000 right now, yes—right then.

445 Q. As a matter of fact, you are acquainted with the way they do business over there, aren't you, and did you ever hear of a mine being sold for \$400,000 with \$100,000 in cash? Isn't it always a fact that they take working bond on the mine and pay a certain percentage down and agree to pay the balance if they conclude that, after expiration, it is a valuable property?

The Plaintiffs object to the question as immaterial.

The COURT: If the witness can answer, he may.

Mr. GOODRICH: Answer it.

A. The Great Western lies just about two miles from there and I left there two weeks ago, and I understood it was sold for \$800,000 cash. That is the only one I know being sold for cash.

Q. Do you mean that any of these mines have been sold, or just simply bonded?

A. Well, I give it to you as I heard it: I don't know this to be a fact: the foreman told me, though.

Redirect examination.

By Mr. IVES:

Q. Mr. Bryant, when you sold these claims, what date was it?

A. 1900.

Q. Were there any reasons which influenced you in making that sale for less than the value of the property?

The Defendants object to the question as immaterial and irrelevant.

The COURT: I overrule the objection.

446 Mr. GOODRICH: The defendants except to the ruling of the Court.

A. I located these properties in 1878. I had lived there all those years and my wife was sick. I worked them and made a good deal of money. I had reverses one way and another and so I sold them for what I could get out of them: tried to get more.

Recross-examination.

By Mr. GOODRICH:

Q. You sold them for all you could get, didn't you?

A. Yes sir. I was afraid to refuse the \$4000 they offered me, and that is what I took, for I needed the money; but I really thought I would get the property back.

Q. They paid you \$4000 down, that was ten per cent, and then they took a bond and agreed to pay you the other part of the \$40,000 in installments; isn't that a fact?

A. \$36,000 in twelve months.

Q. \$36,000 in twelve months?

A. Yes sir.

Q. Wasn't that paid in installments?

A. In two payments.

Q. \$4000 and \$36,000?

A. \$36,000 paid in twelve months: just two payments, \$4000 down and the remainder in twelve months—No, I guess there was another payment, come to think about it. The judgment was only twenty-three or four thousand dollars, wasn't it? The way I remember the transaction, we put a deed in escrow—

447 The COURT: What difference does it make?

Mr. GOODRICH: I don't think it makes any.

(Witness excused.)

JOHN GLEASON, called as a witness on behalf of the plaintiffs and duly sworn, testifies as follows:

Direct examination by Mr. IVES:

Q. Your full name, Mr. Gleason.

A. John Gleason.

Q. You reside where?

A. I reside at Gleason, Cochise County, Arizona.

Q. Do you know Captain McKittrick?

A. Yes sir.

Q. And the Ryans?

A. Yes sir.

Q. Are you familiar with these properties formerly owned by the Turquoise Copper Mining and Smelting Company?

A. Yes sir.

Q. How long have you been familiar with them?

A. For eleven years.

Q. Where you reside is the same place this property is?

A. Yes sir.

Q. Are you familiar with the personal property and improvements that have been put on this property of the Turquoise Copper Mining and Smelting Company?

A. Yes.

Q. Do you know whether or not that personal property was removed away from the property in 1906 or 1907?—any of it?

A. It was not.

Q. Or since then, whether any of it has been removed?

448 A. Not that I know of.

Q. Do you know whether the personal property that has always been used in connection with that property is still being used on the mines in connection with it?

A. It is.

Q. Who is using it?

A. Captain McKittrick.

By Mr. GOODRICH:

Q. Who?

A. Captain McKittrick or his superintendent; I suppose it is McKittrick; I suppose it is his mine.

By Mr. Ives:

Q. What is the name of this superintendent?

A. L. I. Tiers.

Mr. Ives: Will it be admitted that Mr. Tiers is employed by Captain McKittrick?

Mr. GOODRICH: I don't know whether he is or not; I don't know anything about him.

Q. What is your occupation, Mr. Gleason?

A. Miner.

Q. How long have you been engaged in mining?

A. Twenty-eight years.

Q. Are you interested in any mines in this district where these mines are?

A. Yes sir.

Q. Are you familiar with these mines?

A. Yes.

Q. Have you been familiar with these mines—for how
449 long have you been familiar with them?

A. For eleven years.

Q. Are you familiar with the mines mentioned in the complaint?

A. Yes sir.

Q. And with all the mines of that camp and vicinity?

A. Yes sir.

Q. What, in brief, has been your experience in mining in the past twenty years?

A. My experience has been from prospector to superintendent of a mine and mine owner.

Q. You have bought and sold mines?

A. Yes sir.

Q. In that district?

A. Yes sir.

Q. And have done everything from prospector to superintendent?

A. Yes sir.

Q. You are familiar with these mines in question mentioned in the complaint?

A. Yes sir.

Q. Do you know, Mr. Gleason, what was the value of these mines mentioned in the complaint in 1904—November?

A. Yes.

Q. What was the value of them?

The defendants object to the question on the same ground as before.

The COURT: Same ruling—I overrule the objection.

450 Mr. GOODRICH: The defendants except to the ruling of the Court.

A. \$400,000.

Cross-examination.

By Mr. GOODRICH:

Q. Have you any interest in this suit?

A. Yes sir.

Q. You put up the money to try it, didn't you?

A. Part of it.

Q. Paid the attorneys part of the money?

A. I expect I will have to pay part.

Q. You agreed to pay them, didn't you?

A. Part of it, yes.

Q. You are paying part of the expenses of these people here?

A. Yes sir.

Q. Do you mean that these claims are worth \$400,000 in cash?

A. There is no mines in that district sold for cash.

Q. That is just what I am getting at. Do you mean a man would take a bond on them, do you?

A. Yes sir, pay a part down.

Q. What percentage down?

A. The usual percentage is ten per cent.

Q. Then they explore the mines and if they conclude it is a good property they pay the balance, and if not they throw it up?

A. Yes sir.

451 Q. That is what you mean by its being worth \$400,000?

A. Yes sir.

Redirect examination.

By Mr. IVES:

Q. Mr. Gleason, you testified that you have to pay some money for this law suit. What were your relations with the Ryans in November, 1904 and 1905?

The defendants object to the question on the ground that the only purpose of that is to show his interest in the suit.

The COURT: I think he may have a right to show what his interest is.

A. I was supposed to have an interest in the property.

Q. What were your relations with the Ryans as a matter of friendship or otherwise?

A. Always good friends and are partners now.

Q. What has been their condition financially?

The defendants object to the question as irrelevant and immaterial.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. I understood they were broke.

Q. That they were broke?

A. Yes sir.

Q. Have you ever had any conversation with Captain McKittrick on the subject?

The defendants object to the question as irrelevant and immaterial.

452 The COURT: Yes, I don't quite understand that the admission could be binding on the defendant in any way.

Mr. IVES: I want to see if he knows in any way.

The COURT: I sustain the objection.

(Witness excused.)

Mr. IVES: That is a demand that was served on all you gentlemen; I suppose you will admit that you received it. (Handing document to defendants' counsel.)

Mr. GOODRICH: If the Court pleases, we object to this.

The COURT: No offer has been made as yet.

Mr. IVES: I offer to introduce that in evidence; I admit that I haven't proved it, but I assume that you do not object on that ground.

Mr. BAKER: Is that for the purpose of proving a demand on these parties?

Mr. IVES: Yes.

Mr. GOODRICH: We will admit there was a demand made on this date—

Mr. IVES: This is the demand.

Mr. GOODRICH: —but this goes on to state a lot of things that is not true.

The COURT: Make your tender.

Mr. IVES: I offer this paper in evidence, it being admitted that this paper was served upon Mr. Tevis and a copy also on Captain McKittrick, at about the time it bears date—September 22, 1906.

Mr. GOODRICH: On account of the recitations contained in there we do not propose to be bound by what they say; we admit the demand was made, but do not admit the recitations there.

453 The COURT: I understand you admit that this document was served on Tevis and McKittrick?

Mr. GOODRICH: Yes sir.

The COURT: I overrule the objection. Let it be received in evidence and marked plaintiffs' exhibit K.

Mr. GOODRICH: The defendants except to the ruling of the Court. (Thereupon the document in question was received in evidence and marked Plaintiffs' exhibit K by the Clerk.)

The COURT: You don't give the date of that.

Mr. IVES: It does not bear date, but it was served on the 22nd of September, 1906. Plaintiffs rest.

Mr. GOODRICH: We ask that the jury be withdrawn so that we can make a motion.

The COURT: Gentlemen, you may retire for a short time into the jury room there; meanwhile don't talk about the case among yourselves or let anyone talk to you about it, or form or express any opinion about it until finally submitted to you.

(Thereupon the jurors retire from the court room.)

The COURT: You wanted to make an offer of some kind, Mr. Ives.

Mr. IVES: The plaintiffs offer to prove by S. M. Bryant that prior to the commencement of the suit by Bryant against the Turquoise Copper Mining and Smelting Company, Bryant met Captain McKittrick and told him that he wanted his money upon the note held by

Bryant upon which such suit was brought, and that Captain McKittrick told him that there was no use for him to pay his proportion of the note as the Ryans could not pay their proportion; and that

454 Bryant thereupon said to McKittrick that if he (McKittrick) would pay his three-sevenths of the note that he was satisfied with the Ryans' part of it and would return the note to the company. That McKittrick at first refused and then offered to pay his proportion of the note at once, whereupon Bryant returned and told McKittrick that he would go with him then and accept the money and deliver up the note; and that thereupon McKittrick said that on reflection he would not pay his proportion; that he would prefer to have the suit brought and the property sold at auction—that the Ryans were broke.

The COURT: I understand you object to that, Mr. Goodrich.

Mr. GOODRICH: Yes, I object.

The COURT: I sustain the objection.

Mr. IVES: The plaintiffs except to the ruling of the Court.

Mr. GOODRICH: Now, we move the Court to instruct the jury to find a verdict for the defendants.

(And thereupon comes the argument of counsel on the above motion of the defendants, at the conclusion of which the jury is brought back into the Court room and called by the clerk, all answering to their names and being all present in the jury box.)

The COURT: Gentlemen, we will not go on with the case until half past one o'clock, meanwhile you will be excused, bearing in mind what I said to you about not talking about this case to anyone or among yourselves or forming or expressing any opinion on the subject until finally submitted to you. We will take it up again at half past one o'clock. Come back at that time.

455 (Thereupon the Court takes a recess until 1:30 P. M.)

(After the noon recess, and before the jury is called back into the court room, the Court delivers the following oral opinion in ruling on defendants' motion:)

The COURT: This motion of the defendants makes it necessary for the Court at this time to place a construction on this contract. The contention of the defendants in effect is this: that under the terms of this contract Tevis and McKittrick were bound only to make a sale of this stock—this 280,000 shares of treasury stock—within two years at such price as the board of directors might determine upon, and apply the proceeds in accordance with the contract, and their contention is that if in good faith they sold the stock at prices authorized by the board of directors, then there is nothing more incumbent upon them to do, and there could be no failure of the accomplishment of the terms of the contract on their part that would authorize an annulment of the contract. Now, I do not think the contract can bear so narrow an interpretation as that. Of course the Court has no right to read into the contract any terms or stipulations not there, but it is the duty of the Court in interpreting the contract to take the whole contract into consideration, and as I view the whole contract upon further examination of it, it seems to me that the intent of the parties, and as may be fairly

gathered from the terms of the contract is this: That Tevis and McKittrick should be put in full control of the management and operation of the company, and for that purpose they were given
456 what they did not theretofore have—a majority of the stock.

They were given the board of directors and in return for that they were to do certain things, namely, they were to sell the treasury stock at such prices as the board of directors might specify and apply the proceeds to paying off the McPherson judgment and the balance up to—(whatever the amount was)—for the management and operation of the property. That they were, as well as the plaintiffs in the case, to do what they could to sell the trustee stock. Now, there was no obligation on the part of Tevis and McKittrick to do these things. In other words there was no obligation that any failure of it would cause any liability on their part pecuniarily or otherwise; but the contract did provide that if they were unable to do these things within the space of two years, then the plaintiffs would have the right to be put back in the position they were in before the contract was entered into. Now, I think a fair construction of the terms of the contract bears that out. But there was no breach of this contract on the part of Tevis and McKittrick until two things had happened: first a failure to do the things contemplated by the contract within two years, and second, a demand on the part of the plaintiffs to be reinvested. The breach of the contract came when a demand was made by the plaintiffs to be reinvested with their original interest and the failure on the part of Tevis and McKittrick to do so. That was the breach; the failure was a failure to carry out the scheme of this contract within the two years, the general scheme of the contract being to pay off the

McPherson judgment and to sell the trustee stock. I cannot
457 agree with the counsel for the defendants in the narrow interpretation they place on the contract, namely, that all the contract provided for was the sale of this treasury stock at such prices as the board of directors might put upon it, and that if they had sold that within two years then there was no contingency on which the plaintiffs could be put back into possession. It seems to me that the terms of the contract are broader than that, and that it does provide for a general scheme whereby the company was to be put on its feet and the indebtedness paid off and the original amount put in by both parties to be paid off from the sale of the other stock. I do not think it is necessary to go into the question of whether or not there would be a failure on the part of Tevis and McKittrick if the trustee stock had not been sold, because under the evidence in plaintiffs' case there is shown here a failure on the part of Tevis and McKittrick to carry out the other part of the scheme; that is, to sell this treasury stock and pay off the McPherson judgment with it. Of course the McPherson judgment, as a matter of fact, was paid, but it was paid by loan and no portion of the proceeds of the treasury stock was applied to paying off that loan. Now if there has been a failure on the part of Tevis and McKittrick to carry out the scheme within two years, then the plaintiffs have a right to be reinvested, but there was no breach until they refused plaintiffs' demand

to be reinvested with their original holdings. The contract seems to bear out that interpretation if you read it as an entirety and take into consideration, as I think I have a right to do in considering a contract, the situation of the parties at the time the contract was entered into. "The parties of the first part," that is Tevis and McKittrick, "shall have the term of two years in which to comply with all the requirements of this contract,"—now, that does not mean the sale of the treasury stock at such prices as the board of directors might authorize: it must have meant more than that. "Should they fail or refuse to comply with all the agreements or stipulations herein mentioned,"—of course if you take the words agreement and stipulation and construe it strictly, there is no specific agreement on the part of Tevis and McKittrick to do any one particular thing, except to sell at such price as the board of directors might specify; but I think that means, and must be construed to mean—reading the contract altogether—a failure to carry out within two years the general scheme of the contract. In that case the agreement shall be null and void. "Should this agreement be annulled by any failure of the parties of the first part to do any and all things herein required of them,"—I do not find any difficulty in construing the word "required" in the light of the circumstances to mean the general scheme of paying off this indebtedness and putting the company on its feet. The words "of them" throw some weight towards the construction placed on it by the defendants, because if we construe it strictly, it means simply to sell treasury stock at the price authorized by the board of directors; but I cannot believe that it was the intention of the parties or the intention of the expression of contract to limit the requirements on the part of Tevis and McKittrick to the sale of treasury stock at the price the directors—their directors—might fix within two years. I think a fair construction of the terms of the contract is, as I have said, that within two years a certain scheme was to be carried out, and if it was not done within two years, then the plaintiffs had a right to be reinvested, and a breach would come on the refusal of Tevis and McKittrick to reinvest them. Now, if that is so, then the plaintiffs have here a cause of action based on this contract which would accrue at the time of the refusal of the defendants to put them back in possession and reinstate them as they were in the first instance. The allegations of fraud contained in the complaint have no necessary bearing on the cause of action as thus construed. The proof with respect to all the transactions of the defendants that took place after this demand was made is immaterial so far as sustaining the plaintiffs' contention in this case, except as to show the measure of damages, because if by these various transactions they put it out of their power to reinvest the plaintiffs with the stock and the management of this corporation, then the measure of damages would be the value of that stock, and the evidence is competent as showing the situation at this time when the suit was brought. But, as I say, the breach occurred in their failure to reinvest them and that is the time at which the damages must be computed; in other words, the value of the property at that time. I

think if this cause of action *were* based solely on fraud, it might be the duty of the Court to sustain the motion of the defendants
460 and dismiss this case, because it seems to me that the allegations of fraud and the proof with respect to fraud are with regard to matters that arose subsequent to this demand in this case, if I understand the date of the demand.

Mr. GOODRICH: May I suggest, Your Honor, that you have stated that these defendants, if they have put it out of their power to comply with the contract to reinvest them, they would be liable. Now, they put it out of their power with the knowledge and consent of the plaintiffs in the case, because it was contemplated that they do just what they did do. Now, then, they are estopped, it seems to me. That contract contemplated that they do just what they did do—change the capitalization from ten dollars to one dollar stock and sell what they could: that is a part of the scheme and the plaintiffs are just as much bound by it. They entered into a contract contemplating just that sort of proposition, and these parties have tried to carry it out—they did carry it out in every particular except to reinstate them. Now the plaintiffs in this case contemplated that they should do just exactly what the defendants had done, and they are estopped to say they haven't done it. If you say the defendants put it out of their power, they did it with their knowledge and consent and under the terms of the contract to which the plaintiffs were parties.

The COURT: Why have they put it out of their power? If they hadn't transferred these properties to some other people they might still give the plaintiffs back their controlling interest in the stock.

Mr. GOODRICH: In what stock?

461 The COURT: The new or old corporation: they could not reinstate them in the old stock because that was surrendered—it had to be surrendered,—but new stock could be issued. That is why I say all these acts subsequent to that time would be competent as showing that it is now impossible for the defendants to put them back because of actions that have taken place since the sale of stock and the new company formed, and so forth and so on. But the time when their rights accrue it seems to me would be the time of the demand on the part of the plaintiffs to be reinstated, and if at that time they were in a position where they could be reinstated without any fault of theirs, it was the duty of the defendants to reinstate them.

Mr. GOODRICH: In answer to that I will state that all these transactions occurred long before, as I remember this demand.

The COURT: With respect to that, unless the plaintiffs can show to the satisfaction of the jury that they postponed this demand because of a statement or statements made to them by the defendants, they would not be entitled to recovery: if they can show, as there has been some evidence, that they postponed their demand because of statements that they would be protected, they would be excused from making the demand until later; but if the evidence did not establish that, they would not be excused from making the demand, and they then would not be entitled to compensation in

damages. There is evidence that they asked McKittrick what he was going to do and he said everything would be all right because Tevis would protect them; and if they forebore to make the demand at the request of the plaintiff, that would excuse them. They said they went to McKittrick and he asked them to postpone it, and they did.

Mr. GOODRICH: The property had gone, and absolutely sold and passed beyond the control of any of these parties, either the plaintiffs or the defendants; and in 1906—long afterwards—they made this demand.

The COURT: Yes, unless, perhaps, they were excused as I say.

Mr. GOODRICH: As I remember the testimony, this conversation at the Hollenbeck Hotel occurred after this sale.

Mr. IVES: No, it was May, 1905.

Mr. GOODRICH: These judgments had been obtained then, hadn't they?

Mr. IVES: No; suit had been commenced and was pending, but no judgment had been rendered.

Mr. GOODRICH: The Cochise County judgment was rendered in July.

Mr. IVES: July, 1905.

The COURT: What I am trying to do is to narrow it as much as possible in my own view so both sides may understand what my present belief is with respect to the legal situation, so we will know what is to go to the jury and what is not to go to them.

Mr. BAKER: When these parties made the demand it constituted the breach.

The COURT: It comes to whether I am to instruct the jury to find a verdict for the defendants or whether I am to instruct the jury that, if after the expiration of two years this contract had not been carried out, the plaintiffs had a right to be reinvested.

Read the defendants' motion, Mr. Reporter.

(Thereupon the reporter reads the defendants' motion as follows: Now, we move the Court to find a verdict for the defendants.)

The COURT: I deny that motion.

Mr. GOODRICH: The defendants except to the ruling of the Court.

The COURT: Let the jury return.

(Thereupon the jurors return into Court and are called by the Clerk, all answering to their names and being all present and in the jury box.)

Mr. GOODRICH: I would like to ask Mr. Jepp Ryan a question or two.

JEPPI RYAN, recalled as a witness on behalf of the defendants, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. Mr. Ryan, you stated that you tried to sell to O. B. Taylor, Amos Wilson and others portions of the 200,000 shares of trust stock. Why didn't you sell it?

A. Because they said they didn't want to be in with the minority interest.

Q. Now there was some mention made about stock being deposited in some bank in Leavenworth, Kansas.

A. Yes sir.

464 Q. How was that deposited?

A. Put up as collateral for a loan.

Q. When was it deposited?

A. It was deposited, I think, in 1902 sometime; maybe before that, I don't remember.

Q. Was it ever redeemed?

A. It can be at any time.

Q. Was it ever redeemed?

A. No sir.

Q. Did you ever pay the debt?

A. Most of it, yes sir.

Q. You have paid it?

A. Most of it, yes sir.

Q. You say you can redeem at any time?

A. Yes sir.

Q. What was the amount of the debt?

The plaintiffs object to the question as immaterial.

Mr. GOODRICH: I want to see whether he has control of this stock or not.

The COURT: I overrule the objection.

A. \$11,000.00.

Q. To whom was it placed?

A. To four people.

Q. Wasn't it placed to a bank there?

A. They held it in trust for these four people.

Q. Was the total amount of the indebtedness only \$11,000?

A. Yes sir, to these four.

Q. To what four people was it placed?

465 A. O. B. Taylor, Mr. Denton, Mr. Cauldwell and Henry Atkinson.

Q. You say it was placed in the First National Bank of Leavenworth?

A. As trustee for these four people, yes sir.

Q. That was for money advanced to you, wasn't it?¹

A. Yes sir.

Q. Wasn't it \$90,000?

A. No sir.

Q. How much do you say?

A. \$11,000.

Q. Only \$11,000?

A. Yes sir.

Q. Has the bank ever taken any steps to foreclose the mortgage?

A. No sir.

Q. You never sold the stock?

A. No sir.

(Witness excused.)

W. H. MCKITTRICK, one of the defendants, called as a witness on behalf of the defendants and duly sworn, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. Please state your name, Captain McKittrick.

A. W. H. McKittrick.

Q. Where do you live?

A. Bakersfield.

Q. California?

466 A. California.

Q. What is your business?

A. I have been a stock raiser in this territory for twenty years, and I am now farming at Bakersfield.

Q. You lived in this territory formerly?

A. In Cochise County, at Wilcox, for over twenty years.

Q. How long?

A. Over twenty years—at least I owned property there; I lived there ten years about.

Q. Are you one of the defendants in this case?

A. I am.

Q. Do you know the plaintiffs in this case?

A. I do.

Q. Do you know Mr. Tevis?

A. I do.

Q. State whether or not you met, on or about the 29th of November, 1902, the plaintiffs in this case at Wilcox.

A. I went down to Wilcox to make my shipments of cattle to Bakersfield, and it was about the time of the annual stockholders' meeting.

Q. Of what company?

A. The Turquoise Copper Mining and Smelting Company. The annual meeting was to be held on the 12th of October.

Q. Will you take this book and state what it is?

A. Yes sir; the minutes of the Turquoise Copper Mining and Smelting Company.

Q. Look at the minutes and see when the annual meeting was to be held before it was changed, if it was changed.

467 A. It was on the eighth, instead of the twelfth—the stockholders' meeting was held——

Q. State what the regular time for holding it is.

A. On the eighth of October; then it was postponed.

Q. To what date.

A. To the twelfth.

Q. October?

A. Yes. I didn't go down until—when was Mr. Tevis there?

Q. That is shown by the minutes, isn't it?

A. Yes sir.

Q. Now what occurred on the twelfth, as shown by those minutes?

A. (Reading from minutes.) There being present at said meeting E. B. Ryan and P. B. Soto, and beside them Jepp D. Ryan,

Thomas C. Ryan and E. B. Ryan, proxies, representing a majority of the capital stock—

The COURT: You are reading too fast.

Q. I am just asking when the meeting was postponed to.

A. From the eighth to the twelfth.

Q. Then postponed from the twelfth to what date?

A. Until the 29th day of November—no, another meeting postponed, I see—until the 26th and again postponed.

Q. Of November?

A. Yes sir; and from the 26th postponed again to the 29th.

Q. Where were you on the 29th?

A. I was at Wilcox, to attend to my shipping of cattle.

Q. What occurred that day with reference to this transaction?
468

A. I met the Ryan brothers—Jepp Ryan, T. C. Ryan and E. B. Ryan—at the Wilcox Hotel; they asked me what I was going to do about the redemption of the Bryant mortgage; I told them, nothing; and they asked me what is Mr. Tevis going to do, and I said, nothing. Then they said, if you don't—You know you are the minority stockholders and if you don't redeem the property you will be out of it, because we have made a deal with a man by the name of McPherson at Omaha who is going to keep the property; and then I said to Jepp this looks like a hold-up game, and asked him why as president of our Turquoise Mining Company, and being the majority stockholder representing the majority of the stock—why he as president of our company bid in the Bryant judgment for McPherson; and things got kind of warm in the argument and I walked out; and as I walked out Jepp Ryan came with me down the stairs and we walked down alone in front of Mr. Morgan's store and we sat there and talked a while, and then I asked Jepp why he would do a thing of that kind as president of the company. He said, I am in a hell of a fix and I said what is it. He said, "I might just as well make a clean breast of it now as any other time: I made an arrangement with this man McPherson of Omaha that unless you as minority stockholders bid it in, which would leave us still in control—we would still own our four-sevenths and you would only have your three-sevenths;—that unless you bought it in, I would bid it in for McPherson, and after I had bought this judgment for McPherson he was to hold the property and I was to get the money and pay McPherson, and after I had paid McPherson I was to
469 form another company and give McPherson part of the stock."

The COURT: You mean by "I," Jepp Ryan?

The WITNESS: Yes sir, that was the conversation.

Q. What else did he say about McPherson?

A. I am coming to that now; he said, "My reason in telling you this is that the bank at Leavenworth have foreclosed on our property in Kansas—or are about to foreclose, and there is a Jew money lender back East who had foreclosed on our property in Montana and we haven't a dollar in the world, and we haven't any credit, so

I cannot carry out my contract with McPherson." I said, "that is a fine way to do us, Jepp——"

Q. Well, what occurred?

A. We talked a little more and I said I am willing to let you lose the property, but we will lose the property, and he said we are both to lose unless you and Mr. Tevis come in and redeem. I said I am not coming and Mr. Tevis is not coming in as minority stockholders and put you people back in control to do just as you want; we are sick and tired of it and Mr. Tevis is disgusted with the whole business. He said we will give you any kind of a deal you want if you will save the property for us. So we walked back, and as we walked back up the street something was said about a lawyer, and in Wilcox there are no lawyers, and we happened to know of the editor of a paper over there, so we walked across the street to his office and asked him if he would draw up a contract and he said he would and that he would be over in a few minutes; so we told him to come back to the

Wilcox hotel. We went back to the hotel and there were the
470 other two Ryans and the three of them had an awful pow
wow. Pretty soon Anderson came back and I went up stairs
with him and Anderson drew up the contract as best he could.

Q. That is the newspaper man?

A. Yes sir. He drew up the contract as best he could with all the row going on about him; once he got up and went out, it was too much for him; but finally the contract was drawn up. I never drew up a contract in my life, and I was just as innocent about any contract as any of the rest of us had, so far as that goes.

Q. Did you hear anything about a previous contract drawn up by the Ryans?

A. No sir.

Q. Did you ever hear of that?

A. No sir.

Q. The only time Soto came in there was——

A. He drew up the minutes of this contract and went over to draw it up on the typewriter, and all this time the row between the Ryan brothers was going on in the room; and he finally brought it back and after more talk it was signed, and Mr. Tevis had ten days in which to say whether he wanted to sign it or not. So I went up to the ranch that night and got my things and took the train and flew back to Bakersfield because we only had at that time less than two months to redeem the property, and I had all my money in there—
\$35,000.

Q. You have heard the statements of the witnesses, the Ryans, as to certain conversations had with you about one contract that was drawn up and presented to you, and you said it was too much
471 like a promissory note?

A. Absolutely false—absolutely.

Q. Nothing of that kind occurred?

A. No sir, I never made such a remark in my life.

Q. The only contract you knew anything about was this one that is attached to the papers here today?

A. Yes sir.

Q. Well, the contract was drawn up and then you went off to California?

A. Then I went to California and presented it to Tevis.

Q. And presented it to Mr. Tevis—

A. And he said he would not have anything to do with it; he said he had had all he wanted of it.

Q. Was there any conversation, or in any conversation you had with the Ryans any statement by you to the effect that you would reinvest them with the title?

A. No sir, never.

Q. Do you know how that clause came to be put in there?

A. No, I do not; only that when Jepp said we could have any kind of agreement, and when we got up there with the Ryans then the row started and it looked as if we would not have anything—

Q. There was a statement by one of the Ryans to the effect—I think it was Jepp—that they were all right and you said you were frozen out and he replied that they didn't want to freeze anyone out.

A. I don't remember any such remark being made.

Q. Was there any such remark?

472 A. I don't think so.

Q. Was there any statement to the effect that you would see that they got their money back?

A. No sir, for this reason: all we had to do—

The plaintiffs object to the witness stating the reason.

Q. Turn to the minute book there, I believe it is all in evidence; I will have to read it.

The COURT: You may read it.

Q. This page 31 shows the minutes of the meeting held at Willcox on the 29th of November, Tuesday.

A. That is the date we had the meeting of the 29th where they changed the capital stock.

Q. (After reading from the minute book.) Now, Captain, what did you do—State whether or not you ever sent a copy of this resolution to anyone and if so to whom and when.

A. I sent a copy to the Ryan brothers at Leavenworth, Kansas.

Q. For what purpose?

The plaintiffs object to the question as immaterial.

The COURT: He may state the purpose.

A. For them to ratify the minutes of our meeting of stockholders' and directors' meeting.

Q. Is this a copy of the one you sent?

A. It is.

Q. When did you send that, as near as you can remember?

Mr. IVES: Did you send it in a letter?

The WITNESS: Yes, I don't remember whether I sent it by registered mail or not, but I think it was.

473 Q. Will you look at that letter (handing to witness) and state when you received it and from whom, and whether in due course of mail or not?

A. Yes sir, received this letter shortly after April 5th.

Q. What is the date of that letter?

A. Shortly after April 4th, I should say—coming from Leavenworth.

Q. Was this ever returned to you? (Handing another paper to witness.)

A. It was ~~received~~ at the same time.

Q. With the letter?

A. Yes sir.

The COURT: What is the date of the letter?

The WITNESS: April 4th, 1903.

Mr. GOODRICH: I want to offer in evidence with this copy of the minutes—here is a ratification signed by all these parties of all these things done at that time; it is attached to the copy and I presume it would just as well be a copy as anything else.

Mr. IVES: I would like to look at them.

Mr. GOODRICH: Certainly (handing paper to plaintiffs' counsel).

Mr. GOODRICH: Any objection, Mr. Ives.

Mr. IVES: None whatever.

Mr. GOODRICH: Are you willing that this document shall be a substitute for this; it is a copy of the minutes with this addenda added?

The COURT: The document may be received in evidence
474 and marked defendants' exhibit No. 1.

(Thereupon the document is received in evidence and marked defendants' exhibit No. 1 by the Clerk.)

Mr. GOODRICH: I will read this ratification to you, gentlemen of the jury. (Reads defendants' exhibit No. 1 to the jury.) I want to offer in that connection this letter and a copy of this resolution with the ratification added. The letter is enclosing of these papers back to McKittrick.

The COURT: The other document is already in evidence; the letter has not been offered yet.

Q. This letter, Captain, of April 4th, 1903, refers to the contracts duly signed; what contracts does he refer to? That exhibit No. 1?

A. Yes sir.

Q. Was that paper enclosed with this letter?

A. Yes sir.

Q. When did you receive that?

A. A few days after the 4th of April.

The COURT: Do you want to offer the letter in evidence?

Mr. GOODRICH: Yes sir.

The COURT: Mark it defendants' exhibit No. 2.

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 2 by the Clerk.)

Q. Now, before that time this resolution was passed, the 26th day of January, 1903—now when did the time expire for the redemption against the purchase of the property under the foreclosure sale of

475 S. M. Bryant against the Turquoise Copper Mining and Smelting Company, and that was bid in by this man McPherson?

A. We didn't get the final papers from the Ryans until January 26th—we got a telegram—we were to hold the meeting on the 24th and they didn't send the papers until too late and they wired authority to hold the meeting on the 26th.

Q. Have you that telegram?

A. It is there, yes sir.

Mr. IVES: I don't want to be technical; he may go ahead and state the things; I have no objection to his telling the story.

Mr. GOODRICH: We have the documents and I would rather offer them in the regular way. Look and see if you can find the telegram.

The COURT: The other side does not deny that they sent the telegram, Mr. Goodrich—unless you think it is important.

Q. Tell when the time expired for the redemption of that property.

A. This meeting was to be held on the 24th and we didn't get the papers, so we held it on the 26th. It only gave me four days to get from Bakersfield to Tombstone, Arizona, to redeem the property.

Q. You never have yet said when the time expired for the redemption of the property.

A. On the 31st of January, 1903.

Q. Now you say you didn't get the papers on the 24th and had to postpone the meeting until the 26th of January, 1903?

476 A. Yes sir.

Q. What papers do you refer to?

A. The papers authorizing us to hold this meeting.

Q. From whom?

A. From the Ryans.

Q. You did get telegraphic authority?

A. Yes sir.

Q. And in pursuance of that you held this meeting?

A. Yes sir, and we only had four days from the 26th to the 31st of January to get down there and redeem the property.

Q. How did you raise the money to redeem it?

A. The only way we could redeem it was, I had to go to Mr. Tevis and say that we are up against this and you will have to raise the money; I cannot raise it, the company has no property—it is in the name of McPherson who holds the property.

Q. Then what did you do?

A. I told him this, that I had all my money in there and someone would have to come to the front to save me—I had to get the money from him. I told him I would go to Los Angeles as soon as I got back and borrow the money from the bank if he would give his personal endorsement on the company's note and I would give my personal endorsement. So finally he consented to loan the money to the Turquoise Company with the understanding that it was only a temporary loan and that I would get the money immediately. I jumped on the cars and went down and redeemed the property and came back. Then I went to Los Angeles to borrow the money and the first man I went to was John H. Norton—

477 The plaintiffs object to the witness stating whom he went to see.

The COURT: The names of the people is not very material is it?

Mr. GOODRICH: I want to show perfect good faith in this transaction from beginning to end. They were under no obligation to borrow this money; they only had four days to redeem this property and they put their hands in their pockets and got the money. It is to rebut the idea of fraud.

The WITNESS: Mr. Norton is a director——

Q. Never mind who Mr. Norton is—you tried to borrow the money——

A. I went to four different banks and they all said no, if you want some money on your personal note that is one thing; but to put up mining paper, we won't have anything to do with it; and I could not raise anything on it.

Q. How did you get the money from Mr. Tevis?

A. From him?

Q. Yes; what security did you give him?

A. Gave him the company note.

Q. Is that all?

A. Yes sir.

Q. He loaned you \$30,000.00?

A. He loaned it because he saw we had to have the money to save our interests and the Ryans' interests.

Q. And you took that \$30,000.00 and redeemed the property?

A. Yes sir.

Q. You executed a note to Mr. Tevis, did you?

478 A. Yes sir, the company note.

Q. Under authority conferred in this resolution?

A. We did.

Mr. GOODRICH: Now, if the Court please, I will go on reading this and examine them as I go along.

The COURT: Do you think it is necessary to read them all? Unless there are some parts that you think are material——

Mr. GOODRICH: The only point about it is that I cannot select parts of it because they are disconnected.

The COURT: I am not going to interfere with you, but it seems to me there might be parts that you would want to omit in order to save time.

Mr. GOODRICH: If I could separate it I would do so, but I haven't the time to do that, and I think it is quicker to read it all. The next is the meeting of the Board of Directors on January 26th, 1903.

(Defendants' counsel reads from the minutes, and during the reading examines the witness as follows:)

Q. This is the resolution of the Board of Directors authorizing the loan you made from Mr. Tevis, is it?

A. Yes sir.

Mr. GOODRICH: The next meeting is November 30, 1903. (Continues reading from the minutes.)

Q. What was done with reference to that? You say that after you had given the note to Mr. Tevis you tried to borrow money to replace that and could not do it.

A. No sir.

Q. Then he held on to the note?

479 A. Yes sir.

Q. When the interest became due what did you do?

A. Passed a resolution of the Board of Directors and issued a note for the interest.

Q. Is this the resolution?

A. Yes sir.

Q. What did you do—borrow the money?

A. We had no place to borrow any money and we had to borrow some money, and so we got it from Mr. Tevis again to pay the interest.

Q. What about the Soto Brothers debt?

A. That was paid out of that money.

Q. So you did borrow enough money, then, from Mr. Tevis to pay the Soto Brothers debt and to pay the interest on the \$30,000 note?

A. Yes sir.

Q. How did you secure that?

A. We gave a note of the company signed by the president and secretary.

Q. Do you remember the amount of it?

A. No—something like \$3,000, wasn't it?

Mr. GOODRICH: The next meeting is February 15, 1904. (Continues reading from the minutes.)

Q. What did you do with reference to that?

A. Passed a resolution.

Q. I know; this is the resolution—what did you do?

A. Paid bills.

Q. Where did you get the money?

480 A. From Mr. Tevis.

Q. Did you borrow it again?

A. Yes sir.

Q. Did you execute a note?

A. Yes sir.

Q. And paid these bills?

A. I did.

Mr. GOODRICH: The next is the meeting of March 14th, 1904. (Continues reading from the minutes.)

Q. What do you mean by "to the Western Company?" What does that resolution mean—what note to the Western Company: "On November 30th borrowed from W. S. Tevis \$2,533.35 to pay the interest on the \$30,000 note to the Western Company." What do you mean by that?

A. It must have meant either to Mr. Tevis, or Mr. Tevis had transferred the note to the Western Company.

Q. That is the same note you gave to him for the first loan you negotiated?

A. Yes sir; I understand he had to have money and transferred it.

Q. Anyhow, it had been transferred to the Western Company?

A. Yes sir.

(Counsel reads further from the minutes.)

Q. I go back to these accounts; were these amounts correct; did the company owe them?

A. Yes sir. All the time we were going down with a diamond drill, and these expenses were connected with that diamond drill when we were doing the boring.

481 Q. This indebtedness to Soto Brothers and Reynaud, what was that for?

A. For things we had to get to go down with the drill.

Q. Is this a correct account of the amounts due?

A. Yes sir.

Q. How were they paid?

A. We had to borrow again from Mr. Tevis; we hadn't sold enough stock.

Q. You did borrow from Mr. Tevis to pay these debts?

A. Yes sir.

(Counsel reads further from the minutes, in which reference is made to a letter sent to Mr. Jepp Ryan dated March 14th, 1904.)

Q. Have you that letter, Captain McKittrick?

The COURT: Are you asking for the original letter he sent?

Mr. GOODRICH: No, not for the original, a copy of the letter.

The COURT: That is in the minutes, isn't it?

Mr. GOODRICH: Yes sir, and he registered it and got a receipt for it.

The COURT: You want the registry receipt rather than the letter—the copy of the letter—don't you?

Mr. GOODRICH: It don't make any difference so we get the——

The COURT: You admit the receipt of it, Mr. Ives?

Mr. IVES: The letter was received, yes.

The COURT: They admit the receipt of it.

Mr. GOODRICH: I want to fix the date.

The COURT: Mr. Ives has the original letter right there.

482 (Thereupon Mr. Ives hands the letter to Mr. Goodrich.)

Mr. GOODRICH: When do you say you received that, Mr. Ives?

Mr. Ives: I don't say; I don't know; I would like to see the registry receipt.

Mr. GOODRICH: I will read the letter while they are looking for the registry receipt. (Reads letter of March 14, 1904.) When was that received by them; what is the date of the registry receipt?

The WITNESS: I am looking for that now; what was the date of the letter?

Mr. GOODRICH: March 14, 1904.

The WITNESS: I find no registry receipt for that.

Mr. GOODRICH: You have no registry receipt?

The WITNESS: No.

Mr. GOODRICH: I thought you had, and I think so yet.

Q. State to the jury what efforts you made to sell that stock.

A. I made every effort in the world that I could to sell it. It was like this: when the property was turned over to us there wasn't a ton of shipping ore on the property; everything had been shipped off that you could ship at any profit, and the only thing to do—I had a talk with Jepp Ryan about it and we made up our minds that the only thing to do was to try to strike something with the diamond drill on the Maxon claim. He was very hopeful, as he said in that letter, that we would strike something with the diamond drill. When I got my father-in-law to take the presidency of this company, he told me he would not—

483 Mr. IVES: Is that General Shafter?

A. Yes sir. He said he would not accept the presidency unless we knew we had ore in sight; that he would not accept if we advertised it all over the country and sold it to Tom, Dick and Harry and widows and everything else; that there might be a loss and he would not have his name connected with anything of that kind. I got a prospectus out—had a man go down and take a lot of views—and I sent it to a lot of friends in the East, and I went to San Francisco and tried to sell stock there. I had to go to my business friends and personal friends, and when they read this prospectus they said this is not a business proposition. I said why. They said you say you have no ore in sight; but I said we are drilling with a diamond drill and if we strike anything the property will be worth something. They said it is no business proposition because *because* you only have in the treasury 240,000 shares of stock and you and the other fellows hold it all—where are we going to get off if you and the other fellows hold all the stock. I said you will get enough if we strike anything with the diamond drill, but I will tell you honestly we haven't struck anything yet. I was a kind of laughing stock, and did everything in my power to sell that stock; I tried honestly and faithfully.

Q. After selling 32,000 shares you could not do any more?

A. For this reason, we had gone down 3,600 feet with the diamond drill and didn't strike anything in one hole, and went down 5,600 feet in another hole and never got anything; and when I
484 tried to sell stock to the next people they said what are you doing. I said we are not doing anything; we have done about as much as we could with the diamond drill, but if you want to take a gamble on the stock you can do it. They said we don't want to gamble. I told the honest truth about that stock.

Q. Did you ever get any reply to that letter of March 14th, from Mr. Ryan?

A. I think not.

Q. He never replied?

A. No sir. If Mr. Bowman would get the other letters out and have them here this would go a little faster.

Mr. GOODRICH: I will read the minutes of April 5th, 1904.

(Counsel continues to read from the minutes down to a point where reference is made to a letter from the Western Company demanding payment of the notes given by the Turquoise Copper Mining and Smelting Company.)

Q. Will you state, Captain, whether you had anything to do with the writing of that demand?

A. None whatever; I never saw it until the day of the meeting.

Q. Have you any interest in the Western Company?

A. None whatever.

Q. Did you cause that letter or demand to be written for the payment of this money?

A. No sir.

Q. You had nothing to do with it whatever?

A. Nothing whatever, sir.

(Reads further to a point where reference is made to a letter written to the Ryans sending them a copy of the minutes of the meeting.)

Q. State what you did with reference to that?

A. I sent the letter by registered mail and I know the cards are there. This resolution required me to send a copy of the minutes of the special meeting of March 14th,—a copy of those minutes.

Q. That was done was it?

A. Yes sir.

Q. Did you get any reply?

A. Not from him; I got registry receipts showing each man had received it.

Mr. IVES: I move to strike out "got registry receipts showing each man had received it."

The COURT: Strike it out.

Mr. IVES: There is no proof that Jepp Ryan received it.

Mr. GOODRICH: Your proof is that Jepp Ryan acted for his brothers, and this is signed by Jepp Ryan.

Mr. IVES: It has his name to it.

Mr. GOODRICH: It says Jepp Ryan, E. B. Carr.

The COURT: Two of them there is no objection to, so you had better separate them. There is nothing on the record to show what you are offering.

Mr. GOODRICH: I offer now, in connection with the copy of the minutes of the meeting—altogether I offer the registry receipt of E. B. Ryan, dated April 12th, 1904, and the registry receipt of T. C. Ryan, dated May 9th, 1904.

Mr. IVES: There is no objection to that.

486 The COURT: Mark them exhibits 3 and 4 respectively.

(Thereupon the registry receipts of E. B. Ryan and T. C. Ryan are received in evidence and marked defendants' exhibits Nos. 3 and 4 respectively, by the Clerk.)

Mr. GOODRICH: Now I offer in evidence registry receipt signed Jepp Ryan, E. B. Carr.

Mr. Ives: We object to that on the ground that there is no proof that Mr. Ryan received it.

Mr. Baker: Put Mr. Ryan on the stand and ask him about it.

The Court: Do you want to withdraw the witness?

Mr. Goodrich: I think it proves itself.

The Court: I sustain the objection.

Mr. Goodrich: No, I will withdraw the witness.

The Court: Step aside for a few minutes, Mr. Witness.

JEPPI RYAN, recalled as a witness on behalf of the defendants and testifies as follows:

Examination by Mr. Goodrich:

Q. Look at that signature and say whose it is.

A. E. B. Carr's signature.

Q. Whose handwriting is that?

A. That is E. B. Carr, my wife's father.

Q. Did he have authority to receive that and sign your name to it?

A. Not that I know of; he was in Leavenworth; I wasn't there; I was in California.

Q. Did he ever send it to you?

A. I suppose he did; I don't know when, though.

By Mr. Ives:

Q. Do you know when?

487 A. No sir.

Q. Are you sure he sent it to you?

The Court: What do you mean by "it"?

Q. Are you sure he sent the letter for which that is a receipt?

A. No sir.

Q. You don't remember?

A. No sir.

By Mr. Goodrich:

Q. Do you say he did not?

A. No sir.

Q. You don't know whether you received that or not?

The Court: I don't quite know what you mean by "that" and "it."

Q. The registered document; the document that was registered; these resolutions that were sent, a copy of which was sent to him of date March 14th, 1904.

The Court: You speak of it as "it," and Mr. Ives speaks of it as a letter, and I don't know that either of these is what you are talking about.

Mr. Goodrich: A copy of the resolutions were ordered to be sent to him by registered letter.

The COURT: No one has asked him whether he received them or not.

Q. Have you ever received them or not?

A. I don't remember.

Q. Do you say that you did not?

A. No sir.

(Witness excused.)

488 W. H. McKITTRICK, recalled as a witness on behalf of the defendants and testifies as follows:

Direct examination resumed by Mr. GOODRICH:

Q. I will ask you if you did forward in due course of mail to Mr. Jepp Ryan a copy of the resolutions of March 14, 1904—and a copy also of the resolution of the Board of Directors of the Turquoise Copper Mining and Smelting Company of April 5th, 1904?

A. Yes sir.

Q. Look at this document, will you, Captain, please, and state if you ever saw it before? (Handing paper to witness.)

A. Yes sir.

Q. Is that Jepp Ryan's?

A. From the tone of the letter and the signature I know it is Jepp Ryan's.

Q. You received it in due course of mail?

A. Yes sir.

Mr. GOODRICH: I offer this in evidence, if the Court please.

Mr. IVES: No objection.

The COURT: It may be received in evidence and marked defendants' exhibit No. 5. Give me the date of it.

Mr. GOODRICH: March 25th, 1904.

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 5, by the Clerk.)

(Thereupon defendants' counsel reads exhibit No. 5 to the jury.)

489 Mr. GOODRICH: The next meeting is May 16th, 1904.
(Counsel continues to read from the minutes.)

Q. What was done with that stock, Captain?

A. Sold to Mr. Jastro.

Q. Is that all you could get for it?

A. Every penny; and when that stock was sold to him—when I told him about the sale of this stock, I told him that there probably would be a voluntary assessment asked from each stockholder to pay the debts of the company and put it on its feet again; and just before that Mr. Wilson of the Bank of Leavenworth, who said the bank owned this stock of the Ryans—

Mr. IVES: I move to strike that out about what Mr. Wilson said about the bank owning the stock.

The COURT: Strike it out. You need not say what the president of the Bank of Leavenworth said about the stock.

MR. GOODRICH: Say you were informed, without naming anyone.

THE WITNESS: This is the first time I was ever on the stand in my life, and it is not intentional—can I say that Mr. Wilson came to see me?

THE COURT: State anything except what some third person said to you.

THE WITNESS: Mr. Wilson came to see me and said he——

MR. IVES: I object to his stating what he said.

MR. GOODRICH: Just say what Mr. Wilson did.

THE COURT: All you are inquiring about is what he did in trying to get the best price for the stock.

490 MR. GOODRICH: Yes sir.

THE WITNESS: All the stockholders were willing to pay their assessment.

Q. Including who?

A. Including Wilson.

Q. He held some stock?

A. He claimed to hold some.

MR. IVES: I move to strike out "he claimed to hold some."

THE COURT: Strike it out.

Q. What did you do towards selling that stock?

A. I was forced to sell it for what price I could get.

Q. Was that the full value of the stock?

A. Yes.

Q. What connection did you have with Mr. Jastro at that time or any time?

By MR. IVES (before witness answers last question):

Q. Do I understand you to say that was the full value of the stock?

A. Yes sir.

MR. GOODRICH: Repeat the last question, will you please, Mr. Reporter?

(Thereupon the reporter repeats the question as follows: Q. What connection did you have with Mr. Jastro at that time or any time?)

Q. What connection did you have with Mr. Jastro? Was he employed by yourself, or an agent of yourself?

A. No sir; he happened to be down at the mine one time when I was there—he knew the property.

491 Q. Who is Mr. Jastro, anyhow?

A. Mr. Jastro is a very influential and quite a wealthy man of Bakersfield.

Q. Was he in your employment, or did you have anything to do with him except at arm's length?

A. Only at arm's length.

Q. He bought that stock of his own volition, or did you ask him to do it for the benefit of someone else?

A. He bought it for himself.

Q. Was that sale made to him in good faith?

A. It was, sir.

Q. Look at this paper and state how and when you received it. (Handing paper to witness.)

A. I received it through the ordinary channel, by mail.

Q. Do you know Mr. Jastro's handwriting—I mean Mr. Ryan's handwriting?

A. I do: I would say that was Jepp's signature.

Mr. GOODRICH: We offer that in evidence, gentlemen.

Mr. IVES: No objection.

The COURT: Receive it in evidence and mark it defendants' exhibit No. 6.)

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 6, by the clerk.)

(Thereupon defendants' counsel reads defendants' exhibit No. 6 to the jury, and while reading the last part is interrupted by plaintiff's counsel.)

Mr. IVES: I think that word is "when," Mr. Goodrich.

Mr. GOODRICH: I think it is "where," but I don't think it makes any difference. (To the witness:) As a matter of fact you were not bringing suit and did not expect to, did you?

A. No sir, never brought any suit.

Mr. IVES: They refer to a suit they threaten to bring and he tells them "when you bring suit let me know."

Mr. GOODRICH: It was some bank.

Mr. IVES: They have sent him the minutes in regard to bringing suit, and he says "when you bring suit let me know about it." I would like to have the jury see the letter.

(Thereupon plaintiff's counsel hands the letter to the jury for their inspection.)

Mr. GOODRICH: I object to his arguing the case to the jury at this time.

The COURT: He is simply showing them the letter, but it need not interfere with your reading the minutes.

Mr. GOODRICH: I would rather not read while they are thinking about something else.

Q. Do you know whether General Shafter—what he did in trying to induce the Western Company to postpone action on the notes?

A. I know he went to see them, but I don't know what occurred.

Mr. GOODRICH: The next meeting was October 5th, 1904; all that is necessary to read of that is that "McKittrick, one of the directors of the company then said that the directors had been notified by the Western Company that the outstanding notes of

the Turquoise Copper Mining and Smelting Company due the Western Company must be paid at once, and that they would not take promises any longer; that some action must be taken at once to settle the accounts with the Western Company or they will sue and get judgment and our property will be sold by the sheriff to the highest bidder." The other meeting was May 16th, 1904; this is October 5th, 1904. "That the board of directors be authorized to immediately negotiate a loan from someone else": what was done about that Captain McKittrick?

A. General Shafter went to San Francisco to try to get a loan.

Q. Did he get it?

A. No sir.

Q. Did you try to make any loan for the company at that time?

A. I tried again, yes sir.

Q. Did you get it?

A. No sir.

Q. Could not do it?

A. No sir.

Q. Suit was subsequently brought by the Western Company in Kern County, was it?

A. Yes sir.

Q. Did you have anything to do with that suit?

A. Not a thing; I didn't know anything about it until a few days after it was brought.

Q. Did you cause it to be brought, or anything about it?

A. No sir.

494 Q. You didn't know anything about it until after it was brought?

A. No sir.

Q. Look at that document and state when and how you received it. (Handing paper to witness.)

A. I received that—the date is September 30th, 1904—just shortly after that I received it. It only had to come up from Los Angeles.

Mr. GOODRICH: We offer that in evidence.

Mr. IVES: No objection.

The COURT: Mark it defendants' exhibit No. 7.

(Thereupon the document—a letter—is received in evidence and marked defendants' exhibit No. 7, by the clerk.)

(Thereupon defendants' counsel reads defendants' exhibit No. 7 to the jury.)

The COURT: You are going back to 1904? What date is that?

Mr. GOODRICH: September 30th, 1904. The next meeting is December 12th, 1904. (Continues reading from the minutes.)

The WITNESS: May I explain about these accounts?

The COURT: Yes.

The WITNESS: The first claim is the Morgan claim. There was some fault in the location of one of the claims owned by this company—the Tip Top; a part of it was located by Casey and Morgan. This was a case of blackmail on this company; somewhere they got hold of Morgan and he said he claimed so much interest in that Tip Top claim; and it went along for several months and

495 I bought him out finally for \$250. That is what that is there. I had to do that to protect the company's property.

About that other claim, the superintendent of the Copper Bell mine took me down and said it is all a mistake about our coming to water—

Mr. IVES: I object to his stating what the superintendent told him: move to strike it out.

The COURT: Strike it out.

Mr. GOODRICH: The next meeting is January 12, 1905. (Counsel continues to read from the minutes.)

Q. State what was the result of that: did you get the money?

A. Yes sir.

Q. Where from?

A. The Western Company.

Q. How did you apply it?

A. To that note that I endorsed at the Citizen's National Bank—the note and \$20.00 interest.

Mr. GOODRICH: April 15th, 1905, is the next meeting. (Counsel continues to read from the minutes.)

Mr. IVES: What is the date of that letter, Mr. Goodrich?

Mr. GOODRICH: The 15th day of April—two years after the \$30,000 note was executed. (Counsel reads further from the minutes.)

Q. Did you meet Mr. Ryan after that, Captain?

A. I don't remember if that was just the date or not.

Mr. GOODRICH: The next meeting is August 21st, 1905. (Counsel continues to read from the minutes.)

Q. Captain, did you send a copy of the resolution made at 496 that meeting, as I have read it, to the Ryans?

A. Yes sir.

Q. Did you get a return from it?

A. Yes sir.

Q. That is a copy of the resolution, is it? (Handing paper to witness.)

A. No, that is a copy of the letter with which the resolution was sent.

Mr. GOODRICH: I want to offer this in evidence: the Ryan letter is pinned to the bottom of them.

Mr. IVES: Yes, I know, it is your letter to Ryan and his acknowledgement.

The COURT: What is it you offer?

Mr. GOODRICH: I offer the letter which accompanied a copy of the resolution that I read.

The COURT: A letter to Ryan from McKittrick?

Mr. GOODRICH: Yes sir, dated June 13, 1905, together with his acknowledgement by registry receipt.

The COURT: Take them one at a time.

Mr. GOODRICH: Very well.

Mr. IVES: No objection to the letter.

The COURT: Let it be received and mark it exhibit No. 8.

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 8, by the Clerk.)

Mr. IVES: Is that the letter that you have just read?

Mr. GOODRICH: No sir, I don't think I have read this one. Is that the one I read?

Mr. Ives: Yes sir.

497 The COURT: Mark it exhibit No. 8.

Mr. Ives: Where is the letter addressed to?

The CLERK: Leavenworth, Kansas.

Q. You sent one to each of these parties—these Ryans—did you?

A. I did, sir.

The COURT: What difference does it make now that you have Mr. Ryan's letter acknowledging receipt of that?

Mr. GOODRICH: I don't care anything about the registry receipt.

Mr. Ives: Let it show that Jepp Ryan didn't sign that.

Mr. GOODRICH: I am not offering that; there is the acknowledgement of the letter; there is his own letter.

The COURT: Have you any objection to that letter, Mr. Ives?

Mr. Ives: No sir.

The COURT: Mark it exhibit No. 9.

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 9, by the Clerk.)

(Thereupon defendants' counsel reads defendants' exhibit No. 9 to the jury.)

Q. With that letter of June 13th, state whether or not you enclosed a copy of these minutes?

A. I did.

Q. Did it include this statement down here: "The secretary then said that on the 24th day of May, 1905, the Western Company had secured judgment in Kern County, California, for \$44,078.05; that on the 20th of July, 1905, for the same claim, judgment in
498 Cochise County, Arizona, for \$44,549.43 and costs; and that on the 20th of July, 1905, W. H. McKittrick had secured judgment in Cochise County, Arizona, for \$9,975; and that on August 12th, 1905, the Turquoise C. M. & S. Company property at Gleason, Arizona, had been sold by the sheriff, and so forth?"

A. Yes sir; what is the date of that, do you say?

Q. The minutes were August 21st, 1905.

The COURT: You have asked him if he sent in that letter of June 13th a copy of the minutes of August 25th, and he said yes; you had better correct that.

Q. State what the facts are.

A. I sent them the registered letters on June 13th and I think on October 25th I sent everything then.

Q. Is not this the letter that you sent with the copy of the resolution with these minutes dated the 25th of September?

A. Yes Sir; here is the cards, and every time I would send them I sent everything that had gone before to keep them thoroughly posted.

The COURT: The only important thing to get is the date that he sent it.

Mr. GOODRICH: That is all.

Q. Did you send it by registered mail and get what purports, at least, to be a receipt for it?

A. Yes sir.

Mr. Ives: What date is that?

Mr. GOODRICH: The 25th of September, 1905.

Mr. IVES: Where was it sent to?

Mr. GOODRICH: To Leavenworth, Kansas.

Mr. IVES: Is the Jepp Ryan receipt sent to Leavenworth too?

499 Mr. GOODRICH: Yes.

The COURT: Gentlemen, we will take a short recess here for ten minutes. You might like to go down stairs, but come back in six or seven minutes. Don't talk about the case meanwhile among yourselves or to anybody else, or form or express any opinion about it until finally submitted.

(Witness leaves stand temporarily.)

(After the recess the jurors return into Court and are called by the Clerk, all answering to their names and being all present in the jury box.)

W. H. MCKITTRICK recalled as a witness on behalf of the defendants and testifies as follows:

Direct Examination resumed by Mr. GOODRICH:

Q. Are those the registry receipts that you received? (Handing cards to witness.)

A. Yes sir.

Mr. GOODRICH: Any objection, gentlemen?

Mr. IVES: I object to the Jepp Ryan one.

Mr. GOODRICH: You say that is not Mr. Ryan's signature?

Mr. IVES: So Mr. Ryan says.

Mr. GOODRICH: Have you observed that it was forwarded to Los Angeles and signed by him?

Mr. IVES: I haven't observed it at all: I asked Mr. Ryan if it wasn't his and he said he didn't think it was.

Mr. GOODRICH: I don't think Mr. Ryan will swear to that. We will offer it in evidence, and if he wants to show that it is a forgery, he can do so.

500 The COURT: You offer the receipt in evidence—the one that he signed for the letter that was sent to Mr. Ryan?

Mr. GOODRICH: Yes sir.

The COURT: Any objection, Mr. Ives?

Mr. IVES: The signature of Mr. Ryan is not proved.

The COURT: You object then?

Mr. IVES: I don't object to its being introduced in evidence, not waiving the fact, however, that it is not Mr. Ryan's signature.

Mr. GOODRICH: We don't have to prove that it is Mr. Ryan's signature; the presumption is that it is. He sent the letter by registered mail and got that receipt.

Mr. IVES: If he thinks that it is his signature, I won't object to it, but I will not agree that it is his signature. I object on the ground that it is not proven to be Mr. Ryan's signature.

The COURT: I sustain the objection.

Q. That is the paper that you mailed to Jepp Ryan and you received that card in return?

A. Yes sir, it was sent to Leavenworth and you can see that it was sent to Los Angeles from Leavenworth.

The COURT: It may go in evidence as the post office document as received by him in return for the letter sent out, but I won't receive it as proof of Mr. Ryan's signature without further proof.

Mr. GOODRICH: I have always understood the rule to be that when a man writes a letter and gets a reply it is presumptively a reply from the party to whom the letter was addressed, and if the party denies that it is his answer, then it is time for us to prove it was. If mail is prepaid and sent by due course of mail, it seems to me it is proper until denied.

The COURT: I will receive it in evidence as a card that came back to McKittrick from the letter that he sent.

Mr. GOODRICH: Very well, then.

The COURT: Mark it defendants' exhibit 10 and the other two 11 and 12; there is no objection to them, I believe.

(Thereupon the registry receipt cards are received in evidence and marked defendants' exhibits Nos. 10, 11 and 12, respectively, by the Clerk.)

Mr. GOODRICH: The next meeting is the second day of January, 1906. (Counsel reads further from the minutes.) The next is a special meeting of January 16th, 1906. (Counsel continues to read from the minutes.)

Q. Captain what were these bills for? Here is a bill—here is the "Prospector's" bill; what was that for?

A. Advertising the sale of the property.

Q. And these other bills speak for themselves, I believe.

A. Yes sir.

Q. County taxes, and so forth. What was that statement you made—advertising the sale—what property do you mean?

A. You just read in the minutes that I advertised the sale—

Q. \$12.50 to the Prospector: that was advertising the sale of the property not included in the sheriff's sale?

A. Yes sir: you just read about a gasoline engine and things I tried to sell. I think there is a copy of the Prospector's notice.

502 (Counsel reads further from the minutes.)

Q. Now Captain, was a copy of the minutes of this meeting of January 26th, 1906, sent to these gentlemen, the Ryans?

A. Yes sir.

Q. All of them?

A. Yes sir.

Q. How were they sent?

A. By registered mail.

Q. Did you get receipts for them?

A. I did.

Q. That is a copy of the resolution and those registry returns, is it? (Handing papers to witness.)

A. Yes sir.

Mr. IVES: No objection to them.

The COURT: They may be marked defendants' exhibit No. 13, including the receipts attached to it.

(Thereupon the copy of the resolutions with the registry receipts attached is received in evidence and marked defendants' exhibit No. 13, by the Clerk.)

Mr. IVES: Let me see that Jepp Ryan receipt, please. (The clerk hands it to him.) I want it to appear that it was forwarded from Leavenworth, Kansas, to Los Angeles and received by Jepp Ryan in Los Angeles.

Mr. GOODRICH: I didn't read it to the jury.

Mr. IVES: I just want the jury to know that it was sent to Leavenworth after he had asked that letters be sent to Banning.

Mr. GOODRICH: That is your side of the story. I will read it, gentlemen—I don't see anything about Los Angeles.

503 Mr. IVES: Los Angeles is on the back of that receipt. (Shows counsel.)

The COURT: What date? (No answer.)

Mr. GOODRICH: This card wasn't sent to Leavenworth.

Mr. IVES: The card was addressed to Leavenworth.

Mr. GOODRICH: The card wasn't sent anywhere; it was issued by the post master at Leavenworth. (Reads) "Return registry receipt. Received from the post master at Leavenworth, Kansas, letter No. 1237 from the postmaster at San Francisco, California, addressed to Jepp Ryan, date 2/19/06. Jepp Ryan." The postmark is Bakersfield, California, February 13, '06; on the back W. H. McKittrick and California.

Mr. IVES: Los Angeles, California; read that part.

Mr. GOODRICH: Post office Los Angeles, California, call station C. July 17th, 1906, is the next meeting. (Counsel reads further from the minutes.)

Mr. IVES: What was the amount of that balance?

Mr. GOODRICH: \$364.95. I would like to ask the Court to adjourn; that is all the minutes of directors' meetings.

The COURT: Gentlemen, we will adjourn here until 9:30 tomorrow morning. Meanwhile don't talk about the case to anyone or among yourselves, or form or express any opinion about it until finally submitted to you. Come back at half past nine o'clock tomorrow morning.

(Thereupon Court adjourns.)

WEDNESDAY, December 23rd, 1908.

(At 9:30 A. M. Court is duly opened and the said jurors are called by the Clerk, all answering to their names and being
504 all present and in the jury box.)

W. H. McKITTRICK recalled as a witness on behalf of the defendants and testifies as follows:

Direct Examination continued by Mr. GOODRICH:

Q. I hand you a paper, Captain, and ask you to state what that is.

A. It is my letter to Jepp Ryan of June 7th, 1904—that is a carbon copy.

Q. What did you do with that letter when you wrote it?

Mr. IVES: It will save time if you will let me see a lot of those things; I don't want you to prove them unless it is necessary; we may admit a great many of them.

Mr. GOODRICH: If the Court please, I cannot do things in a hurry.

Mr. IVES: I was only suggesting this for your own convenience.

Q. You say you mailed this?

A. Yes sir.

Q. You prepared it and put it in the mail and addressed it to Mr. Ryan at Leavenworth?

A. Yes sir.

Mr. GOODRICH: I have a copy of this.

Mr. IVES: You may read the copy.

The COURT: Do you offer it in evidence?

Mr. GOODRICH: Yes sir.

The COURT: Let it be received in evidence and marked defendants' exhibit No. 14.

(Thereupon the copy of the letter in question is received
505 in evidence and marked defendants' exhibit No. 14 by the Clerk.)

Q. And in connection with the letter enclosed, what is that, Captain?

A. That is a letter to Mr. Wilson, the cashier of the First National Bank of Leavenworth.

Q. What did you do with it?

A. Mailed it to Wilson and got an answer.

Q. Did you enclose it to Mr. Ryan with this letter?

A. Yes sir, a copy of that.

Mr. GOODRICH: We offer that in evidence.

Mr. IVES: No objection.

The COURT: Let it be received in evidence and marked defendants' exhibit No. 15.

(Thereupon the letter is received in evidence and marked defendants' exhibit No. 15, by the Clerk.)

(Thereupon defendants' counsel reads defendants' exhibit No. 15 to the jury.)

Q. Captain, you refer here to the bank people; what bank people do you mean?

A. Mr. Ryan told me that the—

Q. Just state what bank people.

A. The First National Bank of Leavenworth.

Q. Is that the one Wilson is connected with?

A. He is the cashier, and the one that had the stock of the Ryans is the president of the bank.

(Thereupon defendants' counsel continues reading exhibit to the jury.)

506 Mr. IVES: I object to counsel reading a copy which does not seem to agree with the original, in that it refers to a good body of ore while the original reads large. I object to this letter and ask that you read the original.

Mr. GOODRICH: I will then read the original. (Reads the original). Do you want this given in evidence in place of the copy?

Mr. IVES: Yes.

The COURT: Let that be in place of exhibit No. 15.

(Thereupon the original is substituted for the copy and marked defendants' exhibit No. 15 by the Clerk.)

Q. Now Captain, you have heard the statement of the Ryan Brothers as to what occurred at Willcox, among other things the statement that you said they would be reinvested; please state your version of that conversation that occurred there; what was said?

Mr. IVES: He has gone over it and said that nothing was said, yesterday.

The COURT: You examined very closely as to that, but you may state again.

Q. What was said in that conversation in Willcox when the contract of November 29th, 1902, was made about the multimillionaire, and about what Mr. Tevis would do? You heard the statements of the witnesses, didn't you?

A. No such thing said as multi-millionaire.

Q. How about reinvesting the Ryans with the original interest.

Q. There was nothing said about it.

507 Q. How come the contract to be made; what was the conversation?

Mr. IVES: I object to the question on the ground that counsel went over it yesterday and asked for the full conversation.

The COURT: It is so long ago that I will allow counsel to ask it once more—you did go over it, Mr. Goodrich.

Mr. GOODRICH: I got him to state it, but there are some particular things stated by the Ryans that I want to controvert.

The COURT: You may go ahead.

Q. Who made that proposition, then, to enter into that contract of November 29th, 1902?

Mr. IVES: I object to that; he only asked for the conversation.

The COURT: I sustain the objection as to the form of the question.

Q. State what was said about it.

A. Mr. Jepp Ryan asked me, after he told me about this deal that he had with McPherson—that McPherson was going to keep it and they didn't have the money and could not redeem it—that he would make any kind of a deal we wanted to make if we could save the property?

Q. Is that all that was said?

A. That is about all that was said.

Q. It is in evidence that P. B. Soto was appointed statutory agent; has that appointment ever been revoked?

A. No sir.

Q. He is still statutory agent?

A. Yes sir.

508 Q. Did you—or so far as you know, Mr. Tevis—have anything to do with bringing the suit of the Western Company in Kern County, California, and Cochise County, Arizona?

The plaintiffs object to that part of the question concerning Mr. Tevis.

The COURT: He may state if he knows.

A. None whatever.

Q. Do you know whether Mr. Tevis had anything to do with it or not?

A. I am quite sure he did not.

The plaintiffs move the Court to strike out the answer as not responsive to the question.

The COURT: He may state.

Q. Did he have anything to do with the execution and sale of the property?

A. No sir.

Q. I believe you have already stated that you had nothing in the world to do with the Western Company?

A. Nothing whatever.

Q. Do you remember meeting Mr. Jepp Ryan at the Hollenbeck Hotel in California in May, 1905?

A. I don't remember if that is absolutely the correct date, but it is near that time that I met Jepp Ryan by accident in the lobby of the Hollenbeck, and we went back in the room and I told Jepp everything about the mine—everything that transpired—the whole thing from beginning to end. He didn't object to anything.

509 The plaintiffs move the Court to strike out "I told the whole thing." let him state what he told him.

The COURT: That may be stricken out as a conclusion.

A. Well, I told him everything we had been doing with the diamond drill; that we had gone down so far and didn't strike any ore and no ore in sight, and that we were doing the best we could to sell the stock.

Q. Anything else?

A. He seemed to be perfectly satisfied.

The plaintiffs move the Court to strike out the answer.

The COURT: No, that may stand.

Q. What was said about bringing suit, anything?

A. The only thing said about bringing suit was this: He said, McKittrick, you know that the president of the First National Bank advanced all the money that we put in the mine business, and when I got into financial difficulty he foreclosed on our property and

served me a mean trick and I want to get even with him. Now this proposition I want to make to you and Mr. Tevis—you understand the stockholders cannot bring any action or cause you any trouble because they have nothing to do with it: it is all in Ryan brothers. Now, if you and Mr. Tevis will form a new company and give us some of the stock of that new company, we will never trouble you about the contract.

Q. What was said, if anything, about your protecting the interests of the plaintiffs, at that time?

A. Nothing.

Q. You heard the statement of Mr. Ryan?

A. I did.

510 Q. Is that true?

A. It is not true.

Q. It is not true?

A. No sir.

Q. Was there any statement at that time made by you that the plaintiffs would be reinvested in their interest?

A. No sir.

Q. Or any threat to bring suit against you by the plaintiffs?

A. No sir; the only time suit was mentioned was when he made this proposition and wanted me to see Mr. Tevis, and I told him it would be no good to do that.

Q. I believe you stated that you had notified Ryan by mail—Jepp and the others—of everything that had occurred from time to time.

A. Yes sir: all minutes of meetings and those letters that you have been reading: they were just as well posted as we were.

Q. Among other things did you notify the plaintiffs of the sale of this 208,000 shares of stock to Mr. Jastro?

A. Yes sir.

Mr. IVES: Orally or in writing?

The WITNESS: In writing.

Mr. IVES: The letter is the best evidence.

Mr. GOODRICH: The letter is in evidence.

Q. Have you ever received any protest about the sale of this stock?

511 A. No sir: in fact I never met Jepp Ryan from that time until we met in Tombstone—perhaps have passed him on the street, but we never had anything to say to each other since then.

Q. It is alleged, Captain McKittick, that you did everything you could to prevent the payment of the company's debts: is that true or not?

A. I didn't get that.

Q. It is alleged that you did everything you could to prevent the payment of the company's debts——

A. Absolutely false.

Q. What did you do?

A. I did everything any honorable man could do to sell that stock and pull the company out.

Q. What intention did you have in that matter: did you intend to injure them in any way?

A. Not at all; my interests were with the Ryans more than anything else: my salvation pretty near was with the Ryans.

Q. It is also alleged that you and your co-defendant caused the transfer of the notes that Mr. Tevis held and transferred to the Western Company, to make it appear that it was a cloak—I mean that the transfer was a mere cloak to make it appear that some innocent purchaser held those notes.

A. I know nothing about it, except when the letter was received at the company office: I got it as the secretary.

Q. Now, as to this personal property that is in the mine over there: what became of it?

512 A. It was sold at public sale.

Q. Who bought it?

A. A man named Chase, a mining man.

Q. What became of it finally?

A. This Mr. Chase had mines in California—several mines up there—one in Idaho, a couple of mines in Mexico—he was the man that bid it in: he got the property and paid the money.

Q. He did pay the money for the property?

A. He did.

Q. Did you have any agreement with him that he was to buy the property for the benefit of the company or anyone else?

A. None whatever, no sir.

Q. He bought it for himself?

A. He did.

Q. What became of it subsequently?

A. It stayed on the property, and after the Turquoise Company had lost its interest down there in the property, I bought it after I got a bond on the property—I got a two years' bond—I formed the Tejon Mining Company and got a bond on this property for two years and I bought it back from Mr. Chase.

Q. You bought it for them?

A. I did.

Q. Bought it for yourself?

A. Yes, for myself and the company.

513 Q. Now, there is a clause in one of the letters that you wrote to Mr. Ryan to the effect that Mr. Tevis was a large stockholder—I don't remember the exact wording—but that he had control of the Western Company, and that through his influence probably the Turquoise Copper Mining Company could postpone action on those notes. State what you know about that?

A. Perhaps I exceeded my authority there in stating that he had control, but I knew he had a great deal of influence with them, as I understood at that time that it was composed of members of his family. I do not know whether or not I am correct, but that is my understanding.

Q. Now, Captain, you are familiar with the property down there—the property mentioned in this complaint?

A. Yes sir.

Q. How long have you known that property?

A. Since 1900.

Mr. IVES: We won't object to his competency.

Q. What do you say the value of that property is?

A. At the present time, or when we had it?

Q. At the present time and before too.

A. I could not tell its cash value: no one could tell; it is simply speculative. There was no ore there when the agreement was signed by the Ryans and Mr. Tevis and myself, and we have never been able to find any ore since then—any ore of commercial value. I think one or two cars were picked up around from different places and hand sorted and made a showing.

Q. How long have you known that property?

A. Since 1900.

514 Q. You have had the general management of it for a great number of years?

A. No, the Ryans had control.

Q. You are familiar with the property?

A. Yes sir, I have examined it many times.

Q. Have you been down in the shafts?

A. Yes sir. There was not a pound of shipping ore—well, I won't say a pound—a car load—in the old Tom Scott, and nothing in the Maxon, except that little stringer that didn't amount to anything, and that ore is on the dump yet and has never been moved away—not over three tons.

Q. What is the character of that ore?

A. Sulphide.

Q. Copper, silver or what?

A. Copper ore.

Q. You say it has no commercial value?

A. No commercial value.

Q. How would it pay to ship it?

A. It would not pay. Before we signed the contract we had a bond on the Gleason claim and all our money of the 160,000 dollars was spent on the Gleason claim and not on the present claims turned over in this agreement. We shipped six car loads of sulphide ore from that mine, and everyone of them brought us in debt, and we allowed the property to go back to Mr. Gleason and only a payment of \$16,000 was due on it, and we left five or six hundred tons of this ore on the dump because it was no good to us. Since then the price of copper went up to 25¢ in that boom and I understand Gleason shipped that copper that was there.

515 The plaintiffs move the Court to strike out that part of the answer relating to what he said about the Gleason claim.

The Court: You may strike out "I understand Mr. Gleason shipped that copper," but it may stand as to the value of the Gleason claim.

Q. You applied for patents and procured them?

A. Yes sir, before the agreement was signed.

Q. What time did you apply for patents with reference to the date of the agreement—November 29th?

A. Before that agreement.

Q. Before that?

A. Yes sir.

Q. What did you do with the \$9,500, or about that, that you received from the sale of stock? and from the sale of the personal property?

A. For a long time we kept a man pumping water out of shaft No. 3; and then I paid for the diamond drill.

By Mr. IVES:

Q. Do I understand that you bought a diamond drill with the \$9,500 derived from the sale of the stock?

A. Yes sir, I think so; and then we had to retemper the shaft.

By Mr. GOODRICH:

Q. You paid for the patents?

A. Yes sir.

Q. Attorney's fees?

A. Yes sir.

Q. Land office fees?

516 A. Yes sir.

By Mr. IVES:

Q. All out of this \$9,500.

Mr. GOODRICH: I am asking what he did with the \$9,500.

A. Now, that is my recollection; the books show for themselves.

By the COURT:

Q. I understand you to mean, Captain, that this \$9,500 all went into the property in some way or other, did it?

A. For necessary things, yes sir.

By Mr. GOODRICH:

Q. There is a balance of three hundred some odd dollars in your hands?

A. Yes sir, \$324.00.

Mr. IVES: That came from the personal property.

Cross-examination.

By Mr. IVES:

Q. When did you buy the diamond drill, Captain?

A. Right after the meeting at Willcox and the signing of the agreement.

Q. What did you pay for it?

A. \$2,500.

Q. Whom did you buy it from?

A. From the — Mining Company.

Q. In that neighborhood?

A. Somewhere there.

Q. Did you pay cash for it?

A. Yes sir.

517 Q. At the time you bought it?

A. Soon after we bought it.

Q. When did you sell the stock?—the first stock.

A. The stock was issued February 17th, 1903. That is of record if I am not absolutely correct.

Q. Now Captain, you didn't, then, pay for the diamond drill with the proceeds of the stock?

A. I don't know that we had the diamond drill at that time.

Q. Will you now repeat your testimony that you paid for the diamond drill out of the proceeds of that stock; you testified that you did.

A. That is a long time ago, and the books show what everything went for.

Q. If the books do not show that you paid for the diamond drill with the proceeds of the sale of the stock, you wish to qualify your testimony to that effect?

A. All I know—

Q. Just answer the question.

The COURT: I don't see how he can answer it.

A. I cannot carry these things in my head so long; I know it was paid for, that is all.

Q. After this conversation that you had with Mr. Ryan at the Hollenbeck Hotel, May, '05, you never saw him after that until you saw him at Tombstone?

A. Not to my recollection; at least I never had any talk with him.

518 Q. At that conversation I think you testified that you told him you were doing the best you could to sell the stock?

A. No, I didn't say that, I don't believe.

Mr. IVES: Will you please turn back to that part of Captain McKittrick's testimony, Mr. Reporter, and read it?

(Thereupon the reporter reads the following question and answer with the plaintiff's objection and ruling of the Court: "Q. Do you remember meeting Mr. Jepp Ryan at the Hollenbeck Hotel in California in May, 1905? A. I don't remember if that is absolutely the correct date, but it is near that time that I met Jepp Ryan by accident in the lobby of the Hollenbeck, and we went back in the room and I told Jepp everything about the mine—everything that transpired—the whole thing from beginning to end. He didn't object to anything." The plaintiffs move the Court to strike out "I told the whole thing," let him state what he told him. The COURT: That may be stricken out as a conclusion. A. Well I told him everything we had been doing with the diamond drill; that we had gone down so far and didn't strike any ore and no ore in sight, and that we were doing the best we could to sell the stock.)

Q. Is it not a fact that the stock had been sold a year before that?

A. Yes sir.

Q. Then you didn't tell him at that time.

A. Well, I didn't mean it that way when I said it.

Q. In fact your recollection as to that conversation is not
519 very good?

A. It was a general conversation about the mine; the way the thing was run and everything; the remark he made about the trade was very forceful—I didn't forget that.

Q. Now, in your letter to Mr. Ryan, June 13th, 1905, in which you told him, as I recollect, that you were going to sell this stock and asked to wire an answer—Didn't he in April write you that his address was Banning, and ask you to address him at Banning?

A. There is one letter from Banning I think he asked me, but all his letters are from Leavenworth and the Hollenbeck Hotel, and not to make a mistake and send them to the Hotel where they might get lost. I took the precaution to send them to Leavenworth so his family might get them and send them to him.

Q. Now in two of his letters he asked you to send them to Banning, didn't he?

A. Not in two of them, no sir. I would not take the chance of sending him letters of that kind to a strange hotel.

Q. Now, in respect to selling this stock, you never made any misrepresentations to anyone in respect to its value?

A. I never did; I told the truth; that it was simply a speculation.

Q. All the time?

A. All the time. After we got down 750 feet with the diamond drill and three hundred some odd feet in another hole and found
nothing, it was very discouraging. I told him everything
520 about the company.

The Defendants object to this line of questioning as irrelevant and immaterial.

The COURT: I overrule the objection.

A. I told them that they could see for themselves; that there was only 240,000 shares in the treasury, and that it was not a business proposition in the first place. If I asked anyone to buy stock, they asked me what are you going to do with only 240,000 shares in the treasury and you fellows own the rest of it; it is not a good proposition.

Q. Now if that was the way you were going to start out to sell stock, what did you make this agreement for and tell these people that you would undertake to sell this trustee stock at not less than par?

The Defendants Object to the question as argumentative.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court. I want to make the further objection that it is immaterial and irrelevant.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Mr. IVES: Read the question, please, Mr. Reporter.

(Thereupon the reporter reads the question as follows:

Q. Now if that was the way you were going to start out to sell stock, what did you make this agreement for and tell these people that you would undertake to sell this trustee stock at not less than par?)

The Defendants Object further to the question as presuming a condition that did not exist.

The COURT: I overrule the objection. Answer the question.

The WITNESS: I would like to have the question repeated.

(Thereupon the reporter again reads the question.)

The COURT: If you don't understand it, say so.

The WITNESS: I don't quite understand it.

Mr. IVES: I will leave that for a moment.

Q. In your letter that your attorney put in evidence—defendant's exhibit 6—from Mr. Ryan to yourself, dated April 28th, 1905, and dated Los Angeles, not Leavenworth; Mr. Ryan winds up his letter, "my address will be Banning, California."

A. Doesn't he say, "I am going to a mine ninety miles away?"

Q. Yes, but he says, "My address will be Banning, California." Now I ask you why, when you wrote him this important letter about this stock going to be sold at public auction, you addressed that letter to Leavenworth, Kansas, instead of Banning?

A. Because it was the only safe way, I thought, to do it. I knew he was traveling between the two places.

Q. Had you before this received a letter from Mr. Ryan dated Leavenworth, before this one of April 28th, 1905? If so, I would like to have you produce it; it is not in evidence.

A. It ought to be there.

Q. From Leavenworth? It is not here; there is one of March, 1904.

522 A. Isn't there one of April 4th?

Q. This is April 28th, 1905. Now, Captain, in your letter of June 13th, you ask him to wire an answer. Why didn't you send a copy of the letter, or duplicate, to Banning, California, where he, just a little more than a month before, asked you to address him, if it was so important that you wanted an answer by wire?

A. I sent it right where I knew he would get it no matter where he might be; he has lived in Leavenworth—he was born there; his address was there, and if anything was ever sent to him there I always heard from him in a few days.

Q. He asked you in this letter of April 28th, 1905, "when are you bringing suit," or perhaps as Mr. Goodrich reads it, "where are you bringing suit." Did you answer that question?

A. Isn't that answered in that letter that a telegram is pinned to?

Q. It is not.

A. He might have asked had we brought suit at that time.

Q. No, you were about to bring it at that time.

A. I didn't bring any suit; we were notified by the Western Company that they were going to bring suit.

Q. Didn't you understand from this letter that he referred to a suit that you had written him had threatened to be brought?

A. He asked me where I was bringing suit; I didn't have anything to do with bringing suit.

523 Mr. IVES: I move to strike the answer out as not responsive.

The COURT: Read me the question, Mr. Reporter.

(Thereupon the reporter reads the question as follows: Q. Didn't you understand from this letter that he referred to a suit that you had written him had threatened to be brought?)

The COURT: Brought by whom?

Mr. IVES: By the Western Company.

Q. Didn't you understand by these words, "when" or "where" are you bringing suit" in Mr. Jepp Ryan's letter to you of April 28th, that Mr. Jepp Ryan referred to the suit that you had written him the Western Company was threatening to bring?

A. Yes, I understood that.

Q. Very well.

A. But I knew nothing about their bringing suit—only that they threatened to bring suit.

Q. Very well. Then when they brought suit in May, why didn't you notify Mr. Ryan that suit had been brought?

The defendants object to the question on the ground that the defendants were not under obligations to notify him.

The COURT: He may answer.

A. I stated a while ago that I was away, and it was as much a surprise to me as anyone else.

Q. And you never notified him that that suit had been brought until long after?

A. That I cannot say, unless the minutes of the meeting show it.

524 By the COURT:

Q. Do I understand that you did notify him when you met him in the Hollenbeck Hotel?

A. We had a general talk.

Mr. IVES: He has not so testified.

Mr. GOODRICH: There is a letter in evidence showing that.

By Mr. IVES: Is it not a fact, Captain, that you yourself went to Tombstone in connection with the bringing of the suit in Cochise County?

A. My own suit, yes.

Q. And at the same time you went to Tombstone for the purpose of bringing your own suit, the suit by the Western Company was brought, was it not?

A. About the same time.

The COURT: When was that?

The WITNESS: In July, 1905.

The COURT: After you had the meeting with Mr. Ryan?

Mr. IVES: Yes sir.

Q. Now, the same attorney was employed in your suit against the

Turquoise Company in Cochise County and by the Western Company against the Turquoise Company, was it not?

A. Mr. Bowman has always been my attorney there.

Mr. Ives: Will you please read the question, Mr. Reporter?

(Thereupon the reporter reads the question as follows: Q. Now the same attorney was employed in your suit against the Turquoise Company in Cochise County and by the Western Company against the Turquoise Company, was it not?)

A. That I could not say. Mr. Bowman has always been
525 my representative.

Q. Now at that time the firm of Bowman and Pickett represented the Turquoise Copper Mining and Smelting Company, didn't they?

A. I don't think Mr. Pickett did.

Q. They were partners?

A. My business was all with Mr. Bowman.

Q. I asked you if they were partners.

A. I don't know whether they were partners or not.

Q. You remember the notice in the directors' meeting of their salary being paid to July, 1905; that was in the minutes. Now, did anyone come down with you to Tombstone, or was anyone there representing the Western Company?

A. I don't know.

Q. Now, as a matter of fact, didn't you take down with you the judgment roll of the Kern County suit in the suit brought by the Western Company?

A. No sir, I have no recollection of it. Mr. Bowman, perhaps, can answer that.

Q. No one representing the Western Company went down at that time?

A. That I do not know anything about the Western Company.

Q. Isn't it a fact, Captain, that your suit against the Turquoise Company and the Western Company's suit against the Turquoise Company were brought in Cochise County the same day and the same time; that the business of it was transacted by you?

A. No sir; I don't know who it was transacted by, unless Mr. Bowman.

526 Q. Now the Western Company when they bid for this property under the sheriff's sale, paid enough to cover the full amount of your judgment, didn't they?

A. I sold them my judgment.

Q. Before the execution?

A. No, after the sale; I didn't know just—I sold it—I made arrangements to sell before I got judgment.

Q. You received the full amount of your judgment?

A. Yes sir.

Q. And you received it from the hands of the Western Company?

A. Yes sir.

Q. By an arrangement made prior to the execution sale and an understanding between you and them?

A. Now, I cannot remember that; I don't—

Q. Why did the Western Company advance this money for your judgment when you had no priority?

A. I don't know.

Q. Did they do it at your request?

The defendants object to the question as immaterial and irrelevant under the ruling of the Court as I understand it.

The COURT: I don't see where it makes much difference in this case, Mr. Ives, what the situation was with respect to that. In some other action you might have some claim with respect to this \$9,000, but it does not seem that it can be covered in this one.

Mr. IVES: I agree that it does not, but inasmuch as counsel took the contrary view— However, I will not pursue this line of
527 argument any further.

Q. You knew during all this time since the signing the contract that the Ryans were broke, didn't you—practically?

A. Jepp told me so: he said that these people—this Jew money lender in Chicago had foreclosed on their land in Montana and this man at the bank in Leavenworth had foreclosed on their land in Kansas.

Q. Now, you never wrote Mr. Ryan any other letters than those offered in evidence, did you?

A. That I could not say.

Q. You haven't any copies of them among your papers?

A. I don't believe I have.

Q. So far as you know?

A. Yes.

Q. And you had no conversations with him other than those testified to on any matter of business?

A. No sir.

Q. It has been intimated that the Ryans delayed in sending back their consent and resignations—their consent to the reorganization of the company. The resignations were to be prepared by you and sent on to them, were they not?

A. Yes sir.

Q. Is it not a fact that you didn't send them until the 10th of January, 1903?

A. The 10th of January? I could not say when they were sent; but we didn't get—we got their sanction to hold the meeting on January 24th, and the papers they sent back didn't get there and we had to wire them, and the telegram has been put in evi-
528 dence.

Mr. IVES: I presume you will admit, Mr. Goodrich, that this is Captain McKittrick's letter. (Handing letter to defendants' counsel.)

The COURT: I do not believe there was seriously any question about the good faith of any of these parties in January.

Mr. IVES: I only want to prove that the Ryans were not responsible for the delay.

Mr. GOODRICH: Are you going to offer this in evidence?

Mr. IVES: Yes.

Q. You kept the cash books of the accounts with the company, Captain McKittrick?

A. They are not all written up to date; there are one or two items not in there.

By Mr. GOODRICH:

Q. That is your letter is it, Captain? Can you state whether or not that is your letter?

A. Yes sir.

Mr. IVES: I offer it in evidence.

The COURT: Let it be received in evidence and marked plaintiffs' exhibit L.

(Thereupon the letter of January 10th, 1903, is received in evidence and marked plaintiffs' exhibit L by the Clerk.)

(Thereupon plaintiffs' counsel reads plaintiffs' exhibit L to the jury.)

The WITNESS: I have this information, if you want it—the permission of Jepp Ryan to hold the meeting of the 24th, and
529 here is our telegram.

Mr. IVES: Just one moment. Now in this letter you say it is necessary for the Ryans to sign the enclosed papers. They were papers consenting to the stockholders' meeting, and the resignations, and all that were prepared, were they not?

A. I don't understand.

Q. They were the papers received on January 26th?

A. The enclosed papers were the proxies.

Q. You testified that this meeting was held on January 26th and that you only had three or four days in which to redeem?

A. Yes sir.

Q. Now the papers you sent to the Ryans and got back on the 26th were not sent by you until January 10th, is it not a fact?

A. No, what was sent were proxies and things of that kind, the ratification of the stockholders' meeting was not sent—we had a letter here that it was the 8th.

Q. I am talking about the resignations that were sent by you in this letter of January 10th, and you got them back and held your meeting on January 26th, isn't that a fact?

A. There was something wrong about them and——

The COURT: What they want to get at is that you didn't send the papers until January 10th.

A. There were papers going between us all the time: they sent the wrong things—some wrong proxies were sent,—and that
530 is what that letter must refer to.

By Mr. IVES:

Q. Then if the Ryans delayed in any way your operations in getting this stock ready for sale, they only delayed it by the necessary time consumed in the mail between January 10th and 26th in getting an answer from Leavenworth; is not that a fact?

A. That is the time these things were received.

Q. And if there was any delay, it was simply surplus time between January 10th and 26th?

A. I think so.

Q. Now, prior to your getting these papers ready, you undertook to arrange to sell this stock, didn't you?

A. We got ready to, but we had no stock to deliver until February.

Q. You made arrangements, didn't you?

A. Tried to.

Q. And succeeded?

A. I don't remember whether we really made a sale or not.

Q. But as a matter of fact, you could have proceeded and undertaken to sell stock upon proper issuance just as well before as afterwards, could you not?

The defendants object to the question—what he could have done is a mere conjecture.

The COURT: I sustain the objection to the form of the question.

Q. As a matter of fact, didn't you sell stock or agree to
531 sell stock prior to the receipt of the stock itself for issue?

A. I didn't sell any stock, but I am quite sure that I tried, for I tried from the first minute the contract was signed.

Q. Did you get any subscriptions?

A. I don't remember.

Q. Is that your handwriting? Just identify the signature, please.
(Hands paper to witness.)

A. It looks like my hand writing.

Mr. IVES: I offer this in evidence.

Mr. GOODRICH: No objections.

The COURT: Let it be received and mark it exhibit M.

(Thereupon the paper—a letter from McKittrick to Ryan dated March 30, 1903—is received in evidence and marked plaintiffs' exhibit M, by the Clerk.)

(Thereupon plaintiffs' counsel reads plaintiffs' exhibit M to the jury.)

Mr. GOODRICH: May I ask that the whole letter be read?

The COURT: Read it all.

Mr. IVES: Very well. (Reads further.)

Q. Now, Captain, what is that about these people who subscribed twenty some thousand dollars—did you let them have the stock?

A. They must have fallen down.

Q. Did you notify the Ryans that they had fallen down?

The defendants object to the question as immaterial.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the
532 Court.

A. Out of that sum there might have been some of those people that I sold stock to, but I could not sell it—Lord knows I tried.

Q. Was this statement in your letter to Mr. Ryan the truth: "I have already about twenty some thousand dollars subscribed for,

but have been waiting to get the papers signed and returned by you all before I issue the stock?" That was true was it?

A. To my belief at that time it was true.

Q. Had they subscribed?

A. I thought they had: they said they would take it. When I used the word subscribed—

Q. Who were they?

A. I think one man was a man I sold 2,500 dollars' worth of stock to that said he would take five, or something of that kind: I cannot remember now who they were.

Q. In the letter which your attorneys have put in evidence from Jepp Ryan to yourself, dated Los Angeles, July 11th, 1906, Mr. Ryan says: "In your letter you say on the 24th of May the Western Company secured judgment against the Turquoise Company, but you don't say where this judgment was recovered—whether in California or in Arizona. Also kindly give me some more definite idea if you can regarding the matter of this indebtedness, to-wit," and so forth, "kindly answer all of these questions." Now in view of Mr. Ryan in this letter asking you for all this information on July 11th, do you

still state that you gave him all this information at the conversation in the Hollenbeck Hotel in May, 1905?

A. As to the dates, I am mixed on those, but I gave him all the information and told him all about the mine and everything that had transpired when I met him at the Hollenbeck Hotel.

Q. At this time—the date of Mr. Ryan's letter to you—your suit in Cochise County was pending, wasn't it—your suit for \$10,000?

A. Why do you call it my suit? I have nothing to do with it.

Q. You were the plaintiff in a suit and employed Mr. Pickett as your attorney.

A. Oh, in Cochise County?

Q. Yes. Now that suit was pending at that time. Why didn't you tell him about it?

A. If that suit was pending I did tell him.

The COURT: He means why didn't you write him a letter.

The WITNESS: Aren't there some letters in July there somewhere?

Mr. IVES: If there are they speak for themselves.

The WITNESS: Well, I think there are.

Q. Captain, Mr. Shafter and Mr. Rice had stock from you, didn't they?

A. Yes sir.

Q. Simply to make them directors, as a show?

A. Yes sir, they were directors.

Q. They were only nominal directors; that is, only nominal owners of stock?

534 A. It was the general's idea to buy some stock, but he didn't have the money at that time and didn't do it.

Q. No reflection on any one—but as a matter of fact General Shafter and Mr. Rice simply had stock put in their names for the purpose of qualifying them as directors, but the stock was your stock?

A. Yes, but it was the General's idea to become a stock holder.

Q. But he never did?

A. No sir: he never had the money.

Q. In this conversation that you had with Jepp Ryan at Willecox that you testified to this morning; that is the conversation in which you and Ryan walked down the street together, that you testified to?

A. It is: we walked down there because Jepp said there is no use of trying to talk business with my two fool brothers around, and we walked down there to have a quiet talk.

Q. How far from the hotel?

A. Just at the end of the street—there is a little bench in front of the store.

Q. Now, refreshing your recollection, isn't it a fact that Jepp Ryan had just recovered from typhoid fever and was in bed at Willecox during the conversation?

A. No, he was dressed and on the bed during part of the meeting—he was out and around.

Q. Now, it is a long time ago: don't you think you can change your statement on that?

535 A. I am positive of it—absolutely positive.

Q. After all this treasury stock was sold, you still issued a note of the Turquoise Copper Mining and Smelting Company, didn't you?

A. Yes sir.

Q. Several of them?

A. We were still working: it was just like grasping the last straw to hang on and do something for the company if we could.

Q. The company had no resources for paying that note, did it?

A. No, unless we struck something—every day we thought we might strike something.

Q. The understanding between yourself and Mr. Tevis and Mr. Jastro and those whom you call the California owners of stock was that you would all put up assessments in case the Ryans did would not?

A. Yes, and we offered to put up for their 99,000 shares.

Q. And if the Ryans didn't put up the assessment then you would not?

A. We didn't want to put up for the Ryans.

Q. I am not asking the reasons, but the fact: that is the fact, isn't it?

A. We would have to put up for their 99,000 shares that they owned, but Jepp told me that his seven hundred and some odd thousand was at the Bank of Leavenworth and practically owned by those people because he didn't know whether he could ever redeem it or not.

536 Q. Now, what do you mean by asking the bank to guarantee its return?

A. Because Jepp had put it up at the bank.

Q. When Jepp Ryan made this proposition to you at the Hollenbeck Hotel, to have the new corporation organized, did you accept it or decline it?

A. I declined it.

Q. For both Mr. Tevis and yourself?

A. I told Mr. Tevis when I went up, about it.

Q. And he approved your declination of it?

A. Yes sir; he didn't want to be a party to it.

Q. You testified that these mines only had a speculative value, Captain.

A. Yes.

Q. Haven't you ever stated that they had a cash value?

A. Well, cash value is the same as speculative value; yes.

Q. Cash value is the same as speculative value, you say?

A. I should think so: I mean by that in the way of some one wanting to give you an option or something of that kind: bond it or something of that kind.

Mr. IVES: Mr. Clerk, will you please hand me the certified copy of the judgment roll of the Cochise County case—the McKittrick case? (The Clerk hands counsel the roll.)

Q. Now I ask you again if you ever stated that this property had a specific cash value, Captain?

A. Well——

Mr. GOODRICH: Wait a minute, Captain. I object to that. There is a way to ask that, and I object to the question—I object to the form of it.

537 The COURT: I sustain the objection.

Mr. IVES: I will withdraw the question.

Q. In your suit for salary in Cochise County, Captain McKittrick, did you not—having been duly sworn in Tombstone before Judge Doan, and being examined by Col. Pickett, your attorney—No, in reply to a question by the Court before giving judgment in your favor against your company—didn't you state—the Court asking you: "What is the probable value of the property, Captain?"—didn't you answer, "These claims, we paid seventy thousand——

The defendants object. There is a proper way to do that—to hand him the paper.

Mr. IVES: Before he answers the question he can see the papers.

Q. Didn't you say, "These claims, we paid \$70,000 for some of them, and then other claims that were bought, I should think about \$10,000—possible \$80,000"?

A. That is a fact.

Q. Then when Mr. Goodrich asked you what is the value of the property, what did you answer now, Captain McKittrick, when your interest is different from what it was at that time, that it has only a speculative value?

A. That is the price we paid for the property.

Q. Then why didn't you answer to Judge Doan's question that the value of the property was only speculative?

A. Because we have been working five years and haven't been able to find any ore.

Q. Since you testified before Judge Doan?

538 A. Oh no.

Q. Then why, when Judge Doan was cross-examining you as to the value of the properties, and asking the question that Mr.

Goodrich asked you, did you not reply to Judge Doan that the properties had only a speculative value?

A. Well, we paid that for the claims—\$80,000.

Redirect examination.

By Mr. GOODRICH:

Q. Captain, in your letter of March 30th to Jepp Ryan, you stated that among other things you see by the minutes of the meeting that that was the way the loan was made. To what minutes do you refer? What did you do with the minutes? Did you send him a copy of them?

A. Give me the date again, please.

Q. Just read the letter: it refers to some minutes.

A. Those were the minutes of the meeting held January 26th: the stockholders' and directors' meeting sent to them to be ratified sometime before that.

Q. What is this paper? Is that the prospectus that you sent? (Handing paper to witness.)

A. Yes sir; that is the one I got out.

Mr. GOODRICH: We want to offer in evidence that prospectus.

The plaintiffs object to the prospectus being introduced in evidence as immaterial.

The COURT: I call your attention to the fact that if one of you appeals this case—just think of printing that. For what purpose do you desire to introduce it?

Mr. GOODRICH: For this purpose: You will remember that 539 there is in evidence a letter in which he approves of this prospectus and says it is the finest thing he ever heard of in his life.

The COURT: What of it? What bearing does that have on the question of Mr. Ryan being reimbursed some money?

Mr. GOODRICH: It has this bearing: he says it is a fine prospectus and approves of it, and in this prospectus the company state exactly how they propose to do business.

Mr. IVES: I will withdraw my objection.

The COURT: I will sustain the objection if you are going to read that to the jury.

Mr. GOODRICH: I will tell you how it has a bearing; because Mr. Ives says why did you make this contract if you are going to say to these people this stock is not very valuable because the mine is a mere prospect.

The COURT: If you want to introduce any particular sentence in that prospectus, I will let you read it into the record, but I am not going to allow the prospectus to be read to the jury at this stage of the case.

Mr. IVES: I suggest that it be allowed to go in and either party read to the jury such parts as they wish.

The COURT: No, I am not going to allow that; it will prolong the argument. This portion of the prospectus is introduced in evidence as counsel now reads.

Mr. GOODRICH: (Reading from the prospectus). In placing the treasury stock before their friends and inviting subscriptions thereto, the management desires to be fully understood as recommending the shares only as a speculative investment in which it has unlimited confidence; that is, the properties of the company are practically undeveloped and no revenue can be hoped therefrom until certain improvements and development work has been done. It is well and truthfully said that no man can see into the ground, and it is possible that the additional expenditure of money upon the properties under consideration may be followed by disappointment. Recently being encouraged by the prospects they (the officers of the company) have increased their investments, secured a controlling interest and put themselves in position which enables them to confidently invite their friends to participate in what appears to be an exceptional opportunity for profit. In doing this, however, and in view of the fact that the intrinsic value of the properties are not now conclusively proven, the management feels it due both to its friends and itself that all who consider becoming interested at this stage should not only be made fully conversant with the condition of the company's affairs, but if they become interested, should be admitted on a parity with themselves. The price fixed upon the shares now being offered (par value \$1.00 each) is twenty-five cents per share, which is a trifle under the cost to them of the shares now held by the directors and officers of the corporation. At this rate the value of all issued shares (\$760,000 par value) is \$190,000 which sum plus \$30,000 borrowed money, and less \$4,000 cash in treasury, is representative of the actual investment in the company's properties at this time. The details, stated in round figures, being shown by the following statement of income and expenditures. It is hoped that the foregoing, together with such inquiry as it may provoke, will lead up to a comprehensive understanding of the business affairs of the corporation, and interest the reader in the following description of its properties.

That is all that I care to introduce of that, I believe.

Mr. BOWMAN: This is the deposition of Thomas B. McPherson, City of Omaha, State of Nebraska, taken on the part of the defendants.

The COURT: Very well. You may step aside, Mr. McKittrick.

(Thereupon the deposition of Thos. B. McPherson is read in evidence.)

Mr. GOODRICH: Mr. Tevis will take the stand.

WILLIAM S. TEVIS, one of the defendants, is called as a witness on behalf of the defendants and duly sworn, and testifies as follows:

Direct Examination by Mr. GOODRICH:

Q. What is your name, Mr. Tevis?

A. William S. Tevis.

Q. Where do you live?

A. In Bakersfield.

Q. California?

A. Yes sir.

Q. Do you know Jepp Ryan and the Ryan brothers?

A. Yes sir.

Q. Do you know Captain McKittrick?

A. I do.

Q. Were you present in Willcox on the 29th of November, 1902?

A. I don't remember being in Willcox on that date.

542 Q. Do you know anything about this contract of November, 1902?

A. I never heard of it until Captain McKittrick showed it to me in Bakersfield.

Q. How long after November 29th, 1902, was it?

A. I cannot recollect the exact date—not very long; probably a few days.

Q. You signed that contract, did you?

A. I did.

Q. What was done with reference to raising some money to redeem the property from the sale made to S. H. Bryant and wife of the Turquoise Copper Mining and Smelting Company?

A. Some considerable time after I signed that contract—I might say here that I objected to the contract—

The plaintiffs object to the voluntary statement by the witness.

The COURT: I sustain the objection. It don't make any difference about your objection.

A. Mr. McKittrick came to me in the latter part of January as near as I can recollect—

Q. 1903?

A. 1903—and told me that he had a few days only in which to redeem the property, and wanted me to advance the money. I declined to do so; I told him that I didn't have confidence in the property.

The plaintiffs object and ask to have the answer stricken out as not responsive.

543 The COURT: Counsel objects to any conversation between them, and I sustain the objection. Strike it out.

Q. State what you did.

A. I loaned the money to Mr. McKittrick to redeem the property.

Q. What money did you loan?

A. That is, I loaned it to the company; I loaned money that was in my hands on trust.

Q. How much did you loan Captain McKittrick?

A. I cannot recollect the exact amount, but the note speaks for itself.

Q. How did he secure it? What promise did he make; did he give you a promissory note?

A. Simply his personal promise that the money would be repaid within a very few days.

Q. It was a temporary loan, then?

A. Absolutely.

Q. Do you remember how much?

A. In the neighborhood of \$30,000.

Q. He gave you—or the company gave you a note for the amount?

A. He did.

Q. Is that the note? (Handing note to witness.)

A. It certainly looks like it; but I thought his endorsement was on it; but I don't see it. I suppose that is the note; yes sir.

Mr. GOODRICH: We offer this in evidence.

Mr. IVES: Let me look at it.

544 Q. That money was borrowed for what purpose?

Mr. IVES: No objection to the note.

The COURT: Let it be received in evidence and mark it defendants' exhibit 16.

(Thereupon the note is received in evidence and marked defendants' exhibit No. 16 by the Clerk.)

Q. Now, what did you do with that note?

A. I held it for a while.

Q. Then what did you do with it?

A. He didn't pay the money back and the time came to return the money to the fund from which I borrowed it, and I didn't have the money myself and consequently I turned the note over to the company.

Q. To what company?

A. The Western Company.

Q. Now that note was subsequently sued upon, wasn't it?

A. I believe it was.

Q. Where were you when that suit was brought?

A. I cannot recollect.

Q. Did you cause it to be brought?

A. I certainly did not.

Q. Who brought the suit?

A. The management of the company.

Q. In Kern County?

A. I really don't know anything about how it was brought, except that it was brought.

Q. Did you authorize or cause it to be brought?

A. I had absolutely nothing to do with it.

545 Q. That was reduced to judgment in Kern County, was it?

A. Kern County, I believe it was.

Q. And subsequently transferred to Cochise County and an attachment obtained on that?

A. So I understand.

Q. Did you have anything to do with obtaining judgment in Cochise County?

A. Absolutely nothing.

Q. Or the execution sale under the judgment?

A. Nothing whatever.

Q. Have you any interest in the Western Company?

A. Not a dollar's.

Q. Are you an officer of the Western Company?

A. I am not.

Q. You are now?

A. I am not.

Q. You are not; do you remember whether you were at that time an officer of the Western Company?

A. It may be possible that I was; I was vice president of the Western Company at one time, but I don't recollect whether or not I was at that particular time.

Q. I hand you, Mr. McKittrick, another note——

Mr. IVES: Mr. Tevis, you mean.

Q. —a note for \$2,533.33. State what that was given for.

The COURT: I don't understand that there is any dispute about these facts that Tevis loaned money and turned the notes over to the Western Company, and they brought suit on it. The
546 only question there might seem to be some question about is his connection with the company; but there is no dispute about all these notes.

Q. Did you ever have any conversation at all with the Ryans about this matter?

A. Not that I recollect.

Q. And you don't know anything about it at all?

A. No, nothing.

Q. State what was done to protect the interests of the company with reference to the sale of stock—— I say state what was done by you and Captain McKittrick with reference to protecting the interests of the company and selling the stock.

A. I tried to sell stock after I signed the contract and before the papers had returned from the Ryan brothers authorizing the issuance of the stock under the new régime. I made a signal failure; no one would buy any stock. I tried a number of my wealthy friends in San Francisco, but they all seemed to look askance on any mining proposition, and I abandoned the effort myself for that reason. I heard afterwards——

The plaintiffs object to the witness stating what he heard.

Q. Never mind what you heard. But you tried to sell the stock and could not do it?

A. I did.

Q. Did you sell any stock at all?

A. I did not.

Q. What steps did you take to protect the company otherwise, in the way of lending money and otherwise?

547 A. I secured money from the Western Company. At that time it hadn't been turned over to the Western Company, and I used the fund that belonged to the Western Company because I didn't have the money personally at that particular time. I advanced it to McKittrick for the purpose of saving the property from going to McPherson, otherwise the property would have been lost.

Q. Now, in all that you did personally, did you intend to divert——

A. On the contrary, everything that I did was for the purpose of protecting these people absolutely.

Q. Now, do you know anything about the sale of 208,000 shares of the stock of the Turquoise Mining and Smelting Company?

A. I do.

Q. To Mr. Jastro?

A. Oh, to Mr. Jastro—I don't know anything about the sale of it to Mr. Jastro.

Q. Did you have anything to do with that sale?

A. No sir.

Q. Did you ask him to buy it for your interest, or for the interest of anyone whatever?

A. I certainly did not.

Q. Is he in your employment?

A. He is not.

Q. Was he at that time?

A. He never has been.

Q. You had nothing more to do with him than any other stranger?

548 A. Yes, more than any other stranger.

Q. So far as this transaction is concerned?

A. No, absolutely nothing.

Q. Now, you are a director and one of the incorporators of the Tejon Mining Company, are you not?

A. I am, or was.

Q. What interest do you own in that company?

A. Absolutely none whatever.

Q. In the Tejon Mining Company?

A. Nothing.

Q. You own no interest in it?

A. None whatever.

Q. Do you own any stock in it?

A. Not a share.

Q. Did you ever own any?

A. I believe ten shares were put in my name to make me a dummy director.

Q. State whether or not you ever did anything to prevent paying the company's indebtedness—the Turquoise Mining and Smelting Company.

A. On the contrary, I did everything to promote it.

Q. It is alleged in the complaint of the plaintiffs that the transfer of the notes executed by the Turquoise Mining and Smelting Company to you for money loaned was a transfer to the Western Company to make it appear that the notes were held by innocent purchasers, and as a cloak so that, in fact, it would—I mean as a cloak so it would appear that the Western Company was an innocent holder of the notes. State what the facts are.

549 A. The money belonged to the Western Company, when I loaned it I simply transferred something to them that they owned.

Q. You know nothing else about this transaction whatever, do you?

A. I may know something else, but I cannot recollect anything in particular at this juncture.

Q. What became of your individual interest in the old Turquoise Mining and Smelting Company?

A. It went out of sight.

Q. What?

A. It has disappeared.

Q. How did it disappear?

A. When the company lost the property—I refused to have anything to do with the property because I didn't believe in it.

Mr. IVES: I move to strike it out.

A. I lost my interest, that is all.

Mr. IVES: I move to strike it out.

The COURT: You mean you didn't have anything to do with the property and by reason of that you lost your interest?

The WITNESS: I lost my interest after the property was sold to the Western Company.

The COURT: Strike out "I didn't believe in it."

Q. The company was sold under execution to the Western Company and you lost your whole interest?

A. I did.

Q. Who is the owner of the stock in the Western Company?

550 A. My family.

Q. How are they the owners of it?

A. The trust fund, it belongs to my wife and children.

Q. How long had they owned that property before this transaction took place?

A. Several years.

Q. It is a corporation, is it?

A. Yes.

Q. This property belongs to the corporation as trustee?

A. The money belongs to the corporation. I had quite a lot of money that passed through my hands to the corporation and this money happened to be to my credit at the time I loaned it, but it belonged to the corporation: I loaned the money and then afterwards transferred the note.

Q. What was the purpose and the business of the Western Company: what was it organized for?

A. Simply to hold in trust moneys that belonged to my children and my wife.

Q. What is its business?

A. It loans money and buys and sells real estate, invests the funds—the trust funds—some inherited funds and some funds that I myself contributed to the corporation.

Q. For the benefit of whom?

A. My wife and children.

Q. Over which you have no control whatever?

A. Absolutely none whatever.

Q. Have you any interest in these properties mentioned in this suit now?

551 A. None whatever.

Cross-examination.

By Mr. IVES:

Q. Mr. Tevis, I see you approved this prospectus that was issued by the Turquoise Mining and Smelting Company. Did you read it before you approved it?

A. Anything I approve I read—I don't know what you are talking about.

Q. I don't know whether it appears—It appears here, "Mr. William S. Tevis, Capitalist, Bakersfield, California." Did that refer to you?

A. I suppose it did.

Q. Now in your operations, Mr. Tevis, you are interested in many corporations, are you not?

A. Yes sir, I am.

Q. Are you interested in any corporations with Mr. Jastro?

A. I cannot recollect any just at the present time—any corporations.

Q. For instance the Kern County Land Company: have you any interest in that corporation?

A. Yes sir, I have—it is merely an indirect interest.

Q. Are you an officer?

A. I am an officer.

Q. What officer.

A. President.

Q. That is the corporation that owns that immense irrigating enterprise in California?

A. It is.

552 Q. The largest in California?

A. I don't know about that.

Q. Does Mr. Jastro hold any position in that company?

A. He does.

Q. What position?

A. General superintendent.

Q. Now you said you contributed some of the funds of this Western Company—Your children are minors?

A. Yes sir, all of them.

Q. They have no other guardian other than yourself?

A. No sir, they have not.

Q. You did not take any active interest in the management of this Turquoise Copper Mining and Smelting Company, did you?

A. No sir.

Q. Did you consult with Captain McKittrick from time to time?

A. He told me things from time to time.

Q. You left it to him?

A. Yes sir.

Q. Did you know of these various notes that were being issued by

the Western Company—by the Turquoise Company to the Western Company, I mean?

A. I presume I did—most of them.

Q. Why did you organize or assist in the organization of the Tejon Mining Company?

A. At the request of Mr. McKittrick.

Q. You knew the purpose of its organization?

A. I had a general idea.

553 Q. To acquire this particular property?

A. He said he wanted to acquire it.

Q. In the name of this Tejon Mining Company?

A. Captain McKittrick was ill at the time and he asked me if I would be a director. I said I would prefer not to, but if it would facilitate him in any way I would be glad to.

Q. Prior to signing the articles of corporation of the Tejon Mining Company you knew that the purpose of it was to acquire the properties of the Turquoise Company, didn't you?

A. I cannot say that I knew it.

Q. You had conversations with Captain McKittrick to that effect?

A. Possibly so.

Q. Surely so?

A. No, because I don't know it.

Q. I say you didn't have any conversation with him to that effect?

A. It is possible that I did, but I am not sure about that.

Q. You advise with the Western Company's directors with respect to the investment of their funds, do you not?

A. I have done so.

Q. You knew that the Western Company bid enough money for these properties to cover both their own claim and McKittrick's claim?

A. I don't remember that I knew that, no: I paid no attention to the Western Company's business at that time—none whatever.

554 Q. Now these moneys that you first invested—this \$30,000—were in your hands as trustee?

A. Not exactly as trustee. The money was some money that was inherited from my mother's estate and belonged to my children, and as I had myself incorporated the Western Company to hold funds that I had from time to time given the children and my wife, I naturally intended to put that money, and did put the money, and considered it to belong to the Western Company, because it was the holding company for the children.

Q. Now prior to this loan of \$30,000 to the Turquoise Company, the Western Company had been in existence?

A. Yes sir.

Q. And had its own bank account?

A. Yes sir.

Q. This \$30,000 was in your hands or in the hands of the Western Company at that time?

A. In my hands at that time.

Q. Why was it not in the hands of the Western Company?

A. Because the principal place of business was in Bakers-

field and Mr. F. S. Rice was manager of the Western Company. I received the money through our office in San Francisco after the death of my mother—

Q. That is all; I don't want to go into your affairs at all—I just want the fact. As a matter of fact before making the loan of these moneys didn't you go over and discuss it with the directors of the Western Company?

A. No, the loan was made in San Francisco.

Q. And afterwards approved by the Western Company?

A. No it was not approved by the Western Company. I just turned it in and they naturally accepted it.

Q. There was no objection?

555 A. I objected myself to doing it very seriously, but I could not get the money back.

Redirect examination.

By Mr. GOODRICH:

Q. You say Mr. Jastro is the superintendent of the Kern County Land Company?

A. General Superintendent.

Q. What interest does he represent?

A. Everybody's interest—Mr. Jastro is practically the manager of the whole property; he is the manager of the property, and upon him devolves the administration of the property in all its branches, except the purely executive branch which I represent.

(Witness excused.)

HENRY A. JASTRO, called as a witness on behalf of the defendants and duly sworn, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. What is your name, Mr. Jastro?

A. Henry A. Jastro.

Q. Where do you live?

A. My home is Bakersfield, California.

Q. You purchased some stock—208,000 shares of the stock of the Turquoise Copper Mining and Smelting Company. State at whose instance or request you made that purchase, and for what purpose.

A. I was at lunch one day and Captain McKittrick asked me to take a flyer with him in the Turquoise mining stock. I

556 think General Shafter was with us and some fourth party. They asked me to put in a bid for it, which I did. He told me at the time that there would probably be a voluntary assessment

levied to put the company on its feet, and said probably we would make some money out of it, but didn't hold out any great hopes—it was simply one of those matters—

Q. Was there any agreement between you and he that either he or the Turquoise Company should receive any benefit from it?

A. None whatever.

Q. Or Mr. Tevis?

A. I don't believe that Mr. Tevis knew I bought the stock; I don't remember having said anything to him or he to me about it.

Q. You are general manager and superintendent of the Kern County Land Company —. What other corporations are you interested in or employed by?

A. The San Juan Boquillas Land & Cattle Co. in Arizona and the Victoria Land and Cattle Company in New Mexico.

Q. Do you hold any other positions?

A. In what way?

Q. As manager of corporations—any official positions of any kind?

A. Official positions, yes.

Q. State them.

A. I am president of the American National Live Stock Association, and I have been chairman of the board of supervisors for 18 years consecutively.

Q. What interest in the Western Company do you represent?

A. Not one cent—don't even know who they are.

557 Q. Are you in the employment of Mr. Tevis?

A. No sir.

Q. Of Captain McKittrick?

A. No sir.

Cross-examination.

By Mr. IVES:

Q. Mr. Jastro, after you purchased this stock, did you tell Captain McKittrick that you would not sell it for five cents a share?

A. Never.

Mr. IVES (To the clerk): Let me see that letter.

The WITNESS: If I did, I don't remember it.

Mr. GOODRICH: I don't see how that is important; I object to it as immaterial what he told McKittrick.

Mr. IVES: Mr. McKittrick, of date June 7th, 1904, from Bakersfield, California, wrote Mr. Wilson, Cashier of the First National Bank of Leavenworth, Kansas, as follows:

"DEAR SIR: Mr. Jastro, who bought from the Turquoise Mining and Smelting Company 208,000 shares of treasury stock, refused to sell for less than five cents a share," is that true?

The Defendants Object to the question as absolutely immaterial and irrelevant.

Mr. IVES: They put it in, I didn't.

The COURT: There is so much irrelevant evidence in this case that it is difficult to begin now to strike it out. You have introduced the letter as being sent by McKittrick to the Ryans which contains this statement in it from McKittrick. Now, so far as that statement

558 might be accepted as a fact, they would have a right to contradict it.

Mr. GOODRICH: What importance is it?

The COURT: I don't see that it is of any importance, but he may answer the question.

A. General Shafter spoke to me about what the stock would be worth if the company was put on its feet again. He was telling me something about Bryant drilling and prospecting, and he said if I were you I would not sell that stock for five cents, and I said I won't, General, and I left and went off and that was all there was of it.

Q. Mr. Jastro, have you any understanding at all with respect to having any interest now in this property by reason of your purchase of that 208,000 shares?

A. Not a bit.

Q. Your \$650.00 is lost?

A. Yes, sir, absolutely; I never knew of the existence of this new company, and I don't know anything about it.

(Witness excused.)

Mr. GOODRICH: If the Court please, we have several more witnesses and it is now seven or eight minutes of twelve——

The COURT: We will proceed a little further; call your next witness.

GEORGE K. REED, called as a witness on behalf of the defendants and duly sworn, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. What is your name?

A. George K. Reed.

Q. Where do you live?

A. Gleason, Arizona.

Q. How long have you lived there?

559 A. Since September, 1906.

Q. What is your business?

A. Mining engineer.

Q. What position do you occupy?

A. Superintendent of the Copper Bell mines.

Q. How long have you been engaged as superintendent of the Copper Bell mines?

A. Ever since I have been there—since September, 1906.

Q. Are you familiar with these mines mentioned and described in this complaint here—the Tip Top No. 1 and 2 and the other mines?

A. I am.

Q. How long have you known them?

A. Ever since I have been there.

Q. You say your business is mining engineer?

A. Yes sir, and superintendent of the Copper Company.

Q. Are you a graduate of a mining school?

A. Yes sir.

Q. What school?

A. The Pennsylvania State College.

Q. When did you graduate?

A. In 1901.

Q. How long have you been engaged in the mining business?

A. Ever since that time, with the exception of a few months at a time that I was following other business.

Q. Have you examined these mines at any time?

A. Not in a professional way.

Q. Did you in any way?

560 A. I have been through them numerous times.

Q. You have been through the tunnels?

A. Yes sir.

Q. And down the shafts?

A. No sir, the shaft was full of water.

Q. What did you find—ore?

A. I never found any ore there blocked out; there are some indications of ore.

Q. What kind of ore?

A. Indications of copper ore—gold ore.

Q. What do you mean by indications?

A. The country rock carries slight values, and there is contacts there and faults and things that might go to produce ore.

Q. These claims adjoin the Copper Bell mining claim?

A. Yes sir.

Q. What would you say was the market value of these claims?

A. Well, as far as the amount of ore in sight is concerned, I would say the value is very slight, but they might have a speculative value of \$50,000.

Q. No more than that.

A. No, I do not think any sane man would offer any more than that.

Q. On what do you base your valuation?

A. I base my valuation on the recent sale of the Copper Bell mines, which had somewhere between one hundred and three hundred thousand tons of ore blocked out and in sight, which
561 sold at sheriff's sale.

Mr. IVES: I object to what it sold at sheriff's sale for. Market value is not forced sale, and sheriff's sale is.

The COURT: Mining property is on somewhat different basis from other property. I think market value must not be forced sale.

Mr. GOODRICH: It sold at public auction, and I think that is a good indication of what the property would bring.

The COURT: Do you press the question?

Mr. IVES: I object to the question.

Mr. GOODRICH: I asked on what he based his estimate of the value and his answer is that he based it on what the Copper Bell produced.

The COURT: Do you wish to go any further?

Mr. GOODRICH: No.

Mr. IVES: Let it go at that then.

(Witness excused.)

LEVI THIERS, called as a witness on behalf of the defendants and duly sworn, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. Please give your name to the reporter.

A. Levi Thiers.

Q. Where do you live?

A. At Gleason.

Q. Cochise County?

A. Cochise County.

Q. What is your business?

A. Mining superintendent.

562 Q. How long have you been engaged in mining?

A. Off and on since 1882.

Q. What experience have you had with mines?

A. Everything, from pounding a drill up.

Q. To superintendent?

A. Yes sir.

Q. Are you familiar with these mines at Gleason mentioned in this complaint—the Tip Top, Tom Scott, Tip Top No. 2 and others?

A. Yes sir.

Q. How long have you known them?

A. Nearly five years.

Q. Have you made any examination of them, or been into them?

A. Yes sir.

Q. What did you find?

A. Indications of ore; that is about all.

Q. What kind of ore?

A. Various kinds: some indications of copper ore, lead, silver and gold ore.

Q. Have you made assays?

A. I have.

Q. What do you say is the market value of the claims?

A. Well, I should say possibly on a speculative value they might be worth forty or fifty thousand dollars.

Q. On what basis do you make that estimate?

A. From what I know of the claims and what is in sight.

Q. What is in sight?

563 A. Practically nothing of a commercial value.

Q. Do you know the Tom Scott claim?

A. I do.

Q. Were you down through that?

A. Yes sir.

Q. Is there any commercial ore blocked out?

A. Not a dollar of it.

Q. Any faults in that claim?

A. A great many.

Q. Describe to the jury about those faults.

A. Well, primarily there is one enormous fault that runs nearly the length of the mountain: coming from the east side that is absolutely cut off all the way from the Silver Bill mine to the Tom Scott Mine. The Bryant ore was cut off by a fault on the north side and cut off by a fault on the south. My opinion is that when they reached the bottom of their old workings at the time they shut down, they were at the end of their ore. I back this up by saying that since the Tejon Mining Company have been working there——

The plaintiffs object as being work done upon this mine since we commenced this suit, and furthermore it is not responsive to the question.

The COURT: I sustain the objection as not responsive to the question.

Q. What have you done towards developing these mines

Mr. IVES: Since when?

Mr. GOODRICH: Any time.

Mr. IVES: I object to the question as not being definite;
564 they are not entitled to show development after the time our cause of action accrued.

By the COURT:

Q. Have you been developing these particular mines?

A. I have for the past two years.

Q. You have been employed the past two years on this property in question?

A. I have, yes sir.

The COURT: I sustain the objection as to what has been done in the last year.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Q. State how long you have been on that property.

A. Nearly five years.

Q. What have you been doing there?

A. I came on as care-taker to begin with.

Q. In the way of developing the property and looking for ore, what have you done?

A. Have spent nearly thirty or thirty-five thousand dollars in the past two years.

Q. Did you find any ore?

The plaintiffs object to the question, as incompetent, irrelevant and immaterial.

The COURT: I sustain the objection.

Q. You say you have been there the last five years?

A. Yes sir.

Q. What year did you go there?

A. 1904, I think.

565 Q. What time in 1904?

A. March 17th, 1904.

Q. What did you find there from March 17th, 1904, up to 1906?

The plaintiffs object to the question on the ground that their cause of action accrued on November 29th, 1904.

The COURT: I don't know about that: it seems to me it accrued when the breach of contract arose. (Argument of counsel in connection with plaintiffs' objection, not taken.)

The COURT: I overrule the objection. You may answer.

Mr. GOODRICH: Please read the question, Mr. Reporter.

(Thereupon the reporter reads the question as follows:

Q. What did you find there from March 17th, 1904, up to 1906?)

A. A little ore on the dump.

Q. What kind of ore was it?

A. Hand picked copper ore.

Q. What was its value?

A. At that time?

Q. Yes; did it have any commercial value at all

A. Yes, I think there were about two cars of ore that would have paid to ship—altogether cleaning up the property.

Q. At what profit?

A. I think, if I remember rightly, that they made \$21.00 on one car over and above expenses, and they made two or three hundred dollars on another car, I think.

Q. What became of the ore in the Tom Scott mine—the silver ore?

A. It was cut off.

566 Q. Did you see any ore when you went through?

A. I never saw a pound of ore in the Tom Scott that would assay over thirty ounces of silver.

Q. What would be its commercial value?

A. It might pay to get it out.

Q. As a matter of fact is not the ore in that district—

Mr. IVES: I have let you lead this witness a little without objecting, but this is too leading.

The COURT: Counsel object to the question as being leading.

Q. As a matter of fact, what is the ore in that district—in the Copper Bell mine and these other mines—used for?

A. It is simply used as a flux—the Copper Bell.

Q. What is the character of this other ore—what could that be used for?

A. It could be used under certain circumstances if we had good value of copper in the camp and a smelter on the ground, it could be used as a flux also.

Cross-examination.

By Mr. IVES:

Q. When you went there, Mr. Thiers, there was some ore on the dump, was there not?

A. Yes sir.

Q. And also in the mine there was some ore in sight?

A. I don't believe there was—maybe a little, but not very much.

Q. In some of these shafts and tunnels there was some ore in sight?

A. A little.

567 Q. How long were you there as care-taker?

A. As long as the Turquoise Mining Company existed; afterwards I was there in charge of the property for the Western Company, and after the Tejon Company took the property over I was put in as superintendent.

Q. Then you were care-taker until July 20th of this year?

A. Sir?

Q. You were care-taker until July 20th, 1908?

A. Yes sir.

(Witness excused.)

Mr. GOODRICH: If the Court please, I think this is all our testimony—there might be something more that we will want to put in a little later on.

The COURT: We will suspend here, then, until have past one, meanwhile, gentlemen, don't talk about this case among yourselves or to anyone else, or form or express any opinion on the subject until finally submitted to you.

(Thereupon Court takes a recess until 1:30 P. M.)

(After the recess the jury is called by the Clerk, all answering to their names and being all present and in the jury box.)

Mr. GOODRICH: I will recall Mr. Reed.

GEORGE K. REED, recalled as a witness on behalf of the defendants, testifies as follows:

Direct examination by Mr. GOODRICH:

Q. Mr. Reed, I understood you to say that you had examined these properties and had been through the tunnels and shafts, etc.

568 A. Yes sir.—Haven't been in the shafts at all, no sir.

Q. You have been through the tunnel of the Tom Scott mine?

A. Yes sir.

Q. Have you been down the shafts of any other claims?

A. No sir, they are full of water.

Q. You are acquainted with the claims?

A. Yes sir.

Q. From an expert and your knowledge of the mines, and the evidence so far as it has developed, what would you state as the value of those mines.

The plaintiffs object to the question as having been already stated.

The COURT: I think he stated that he put an estimate upon it, as I recollect it.

Mr. IVES: He estimated the value as \$50,000.

Cross-examination.

By Mr. Ives:

Q. You have talked this phase of the question over during the recess with your counsel, haven't you?

A. No sir, I have had no conversation whatever with them.

Q. Don't you know of mines being sold at Bisbee for very large sums of money without a ton of ore being in sight.

The defendants object to the question.

Q. Or any other place.

The Court: I sustain the objection as to Bisbee.

Q. Don't you know of mines—copper mines—having been sold for large sums of money without any ore having been developed on them?

569 The defendants object to the question on the ground that it is incompetent, irrelevant and immaterial, and too general. The question is what that mine is worth: not what other mines are worth.

The Court: I overrule the objection.

Mr. Goodrich: The defendants except to the ruling of the Court.

A. Yes, I know of mines having been sold in other districts, but not under similar conditions—districts fully developed that had mines in them that were very rich and had all the ear marks of being a good property.

Q. You mean by "ear marks," surface showings?

A. Yes sir.

Q. Haven't you heard of mines being sold for large values without any surface showings at all, by reason of the proximity of other mines of value?

The defendants object to the question as to indefinite and too general—not confined to any time or place, and no particular district or country.

The Court: I overrule the objection. He may answer.

Mr. Goodrich: The defendants except to the ruling of the Court.

A. No, I do not.

(Witness excused.)

Mr. Goodrich: We rest.

Thereupon comes the testimony of the plaintiffs in rebuttal.)

JEPPI RYAN, recalled as a witness on behalf of the plaintiffs, testifies as follows:

570 Direct examination by Mr. Ives:

Q. Mr. Ryan, in that conversation that you have testified that you had with Captain McKittrick at the Hollenbeck Hotel, did you tell

him in substance that the bank at Leavenworth had advanced the money that you all had put into these mines in question?

A. No sir.

Q. In that conversation, did you state to Captain McKittrick in substance that if they would organize a new company and give you stock in the new company which would own these mines, that you would be satisfied?

A. No sir.

Q. Did you say anything on that subject at all?

A. No sir.

Q. Did you have any conversation with Captain McKittrick at all with respect to any of the affairs of the Turquoise Copper Mining and Smelting Company, at Willcox, outside of the room in the hotel?

The defendants object to the question as not rebuttal.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

A. No sir.

Q. State whether as a matter of fact you had been ill prior to going to that Willcox meeting.

A. Yes sir.

The defendants object on the ground that it is irrelevant and immaterial and not rebuttal.

571 The COURT: I overrule the objection. I don't think it is very important, but I think it is rebuttal.

Q. State whether or not you were in bed at the Wilcox hotel when this business was being conducted.

The defendants object to the question as irrelevant and immaterial and not rebuttal.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the court.

A. Yes sir.

Q. Did you state to Captain McKittrick at Willcox, or at any other time, in substance or in effect that you were uneasy as to whether Mr. McPherson would carry out his arrangement with you, as you testified to?

A. No sir.

The defendants object on the ground that it is irrelevant and immaterial and not rebuttal, and they have gone into the whole conversation on direct examination.

The COURT: You have introduced some evidence as to what the state of affairs was with respect to Mr. McPherson: they have a right to contradict that.

Mr. GOODRICH: He had given his version of it, and our witness gives his version.

The COURT: I overrule the objection

Mr. GOODRICH: The defendants except to the ruling of the Court.

Mr. IVES: Please read the question, Mr. Reporter.

(Thereupon the reporter reads the question as follows:

572 Q. Did you state of Captain McKittrick at Willcox, or at any other time, in substance or in effect that you were uneasy as to whether Mr. McPherson would carry out his arrangement with you, as you testified to?)

A. No sir.

Q. Did you ever say anything to him on that subject at all, other than you have testified to?

A. No sir.

Mr. IVES: That is all.

Mr. GOODRICH: No cross-examination.

(Witness excused.)

JOHN GLEASON, recalled as a witness on behalf of the plaintiffs, testifies as follows:

Direct examination by Mr. IVES:

Q. Mr. Gleason, were you on these mines mentioned in the complaint, or any of them, in the years 1903 and 1904?

A. Yes.

The defendants object to the question on the ground that this witness has been on the stand once and this is not rebuttal.

Mr. IVES: It is absolutely rebuttal.

The COURT: I overrule the objection.

Mr. GOODRICH: The defendants except to the ruling of the Court.

Q. Was there any ore in sight in those mines during those years in these mines?

A. Yes sir.

(Witness excused.)

Mr. IVES: That is our case.

573 The COURT: Gentlemen of the jury, you will retire to your jury room, which you can leave and be within call when I need you. I shall not need you for some fifteen or twenty minutes. Meanwhile the bailiff can get you when I need you, and bear in mind the same admonition I have given you before in regard to not talking about the case among yourselves or with anyone else.

(Thereupon the jury retire.)

Mr. BAKER: The defendants want to make a new motion that the Court instruct the jury to return a verdict for the defendants, for the reason that there is not sufficient reason to return a verdict for the plaintiff in the case.

(Thereupon comes the argument of counsel on the motion which is not taken down by the reporter, at the conclusion of which—)

The COURT: I deny the defendants' motion to instruct the jury to return a verdict for the defendants.

Mr. BAKER: The defendants except to the ruling of the Court.

Mr. IVES: I now move the Court to instruct the jury to bring in

a verdict for the plaintiffs, leaving to the jury only the ascertainment of the amount of damages.

The COURT: I deny the motion.

Mr. IVES: The plaintiffs except to the ruling of the Court.

The COURT: Let the jurors return into Court.

(Thereupon the jurors return into court and are called by the Clerk, all answering to their names and being all present and in the jury box, and after the argument of counsel to the jury, the Court instructs the jury orally as follows:)

574

(Instructions to the Jury.)

The COURT: Gentlemen of the jury, as you have learned, there have been motions made from time to time on one side or the other, both for the plaintiffs and the defendants, during the argument of which you have been sent out. The fact that the Court has denied these motions, and that the matter is before you now, does not mean that the Court has any view with respect to the merits of this case either for the plaintiff or the defendant,—only that the legal situation of the case is that it comes to you for decision on the facts; that is all it means. The Court has no view about this case one way or the other on the question of fact, for that is entirely a matter for the jury to determine. The questions of law that arise during the trial of the case the Court has to determine upon and pass upon, but on the questions of fact the jury is the sole judge. You are the judges of the weight to be given to the testimony of the witnesses on the stand—the weight to be given to the testimony in the case, the credibility to be attached to each and every witness in the case, because, under the law, as I say, the jury is the sole judge of the facts.

Now, this is an action for damages brought by these Ryans, the plaintiffs, against Messrs. Tevis and McKittrick, the defendants, based upon the breach of a contract. The plaintiffs do not base their claim for recovery in this case upon any fraudulent acts on the part of Mr. Tevis and Mr. McKittrick, but they base their claim,

under the testimony and the allegations of the complaint, as
575 they view the testimony, upon the breach of a contract.

Now, you have had read to you two or three times this contract that is the foundation of this law suit—the contract that was entered into between these parties on the 29th day of November, 1902. Now, it becomes necessary for the Court to place an interpretation on that contract as the language of the contract was not altogether plain. It becomes a question of law, then, for the Court to determine what that contract meant, and the jury are to take in this case the interpretation that the Court puts on it as a matter of law. Briefly the contract provided for a certain plan to be carried out within the period of two years. The control of this Turquoise Copper Mining & Smelting Company was to be given to the defendants, Messrs. McKittrick and Tevis, and with a board of directors of their own choosing they were to carry on the business of the company, and within the period of two years they were to do, if possible, certain

things as provided in the contract that you have heard read. Now there was nothing in the contract that required Mr. Tevis or Mr. McKittrick to carry out the scheme; they did not guarantee that at the expiration of the two years anything should have been done that was contemplated to be done in carrying out the scheme. Perhaps that is a little too broadly stated; of course they had to do what they were obligated to do; that is, use their best endeavors to carry out the contract. But what I mean is that they did not guarantee successful results—in order words if at the end of two years these things had not been done as contemplated by the contract, Mr. Tevis and

576 Mr. McKittrick were not under any legal liability to the Ryans for not doing it. In effect what they said by that contract was that they would use their best endeavors to do these things. So I say, if there was a failure on their part to do these things required by the contract, at the end of two years, that did not raise any legal obligation on the part of Mr. Tevis and Mr. McKittrick to the plaintiffs in the case. But the contract provided that if at the end of two years this scheme or plan that the contract contemplated had not been accomplished—if Tevis and McKittrick failed to do it—then Tevis and McKittrick agreed by the contract to turn—to reinvest, rather, the Ryans with the interest they had at the time of entering into the contract.

Now then, the first thing for you to determine by the evidence is what is the situation at the end of two years, for if at that time these things contemplated by the contract had not been done—if Tevis and McKittrick had failed to do them,—then there was an obligation on their part to reinvest the Ryans with the interest that the Ryans originally had, provided the Ryans demanded that reinvestment. So the first thing you should determine under the facts in the case is whether or not in November, 1904, being the time of the expiration of the two years specified in the contract, the situation was such that under the terms of the contract, as I have spoken of them, Mr. Tevis and Mr. McKittrick were obligated to reinvest the Ryans with the four-sevenths interest in the company that they formerly held. If you so find, then the next thing for you to find is whether or not the Ryans ever demanded that they should
577 be so reinvested; because if there never was any demand made on the part of the Ryans to be reinvested, and they were satisfied with the situation and allowed matters to go along, then there was no liability on the part of Tevis and McKittrick to turn over to them the control of the company and reinvest them with the same interest as before. If, however, the Ryans did demand that such reinvestment be made within a reasonable time after the expiration of the time specified in the contract, then it was the duty of Tevis and McKittrick to do so. Now you will have in evidence—you will recall that there was a written demand made upon these gentlemen here, filed in evidence, some time in July—I may be wrong about the time—sometime in the summer of 1906. Now, if that was the first demand that was made on Tevis and McKittrick to reinvest the Ryans with the control of this company, it came too late to be a basis for a claim in this suit, for meanwhile

the Ryans (or Mr. Jeppi Ryan acting for the Ryans) had knowledge of the affairs of the company between November, 1904, and the date of that demand in the summer of 1906. If with full knowledge of what transpired as to these suits, judgments and other things, whatever they were, as testified to here, the Ryans allowed this matter to drift along until the summer of 1906 before making a demand, such demand came too late; and if that was the state of things you ought to find for the defendant- in this case irrespective of anything else in the case. If, however, you should find that demand was made on Tevis and McKittrick by the Ryans to be reinvested with their interest in this company in the early part of 1905, that is, a few months following the expiration of this contract, that was a reasonable time in which to make the demand, and the demand would have instituted—would have been—the basis of a valid claim as set forth in this action here. So that is the next thing for you to determine—when, if any, demand was made, and if it was made within a reasonable time as I have defined it here.

Now, the burden of proof of all these facts that are necessary for the plaintiffs to establish in order for them to recover, is on the plaintiffs; they have to prove their case and the facts necessary to constitute their case, by a preponderance of the evidence. It is not for the defendants to come in and disprove the claim made by the plaintiffs in their complaint; it is for the plaintiffs to establish by a preponderance of the evidence the facts necessary to constitute a legal claim.

Now, as I have already explained, the breach, if there has been any breach at all, by Tevis and McKittrick, has been their refusal or neglect to reinvest the Ryans with the interest they formerly had in this company upon proper demand having been made. If there has not been such refusal upon proper demand, then the plaintiffs, in any event, are not entitled to recover, and you should find for the defendants. The plaintiffs are not entitled to recover unless they did make that demand within a reasonable time after the expiration of November, 1904. If demand was made by them in the early part of 1905—in the spring of 1905—that would have been sufficient time in which to make demand under the evidence in this case. If no demand was made then and not until some time after the Ryans had full knowledge of the law suit brought to foreclose the mortgage, and allowed the matters to go on without making any claim for reinvestment, the subsequent claim came too late and the plaintiffs are not entitled to recover. Now if you find that there was a breach of this agreement by Tevis and McKittrick, and that they did not reinvest the Ryans as they ought to have done; if you find that, and if you find that the plaintiffs have established that by a preponderance of the evidence, you then come to the question of damages. If you do not find that, then your verdict should be for the defendants. But if you think that the plaintiffs are entitled to recover on the theory I have already explained to you, then you go on and discuss what should be the amount of the damages. Now, in that regard, what Mr. Tevis and Mr. McKittrick agreed to do was to put the Ryans back as near as

might be in the situation they were in when the contract was entered into. Then this property was about to be sold under foreclosure sale. Subsequently money was raised to pay off, or redeem, rather, from this judgment, and the money that was used to redeem from the judgment became a debt against the company. So that, if you do find any damages in the case at all, this debt against the company that took the place of this judgment under which the property was to be sold, is a matter to be considered, because, of course, the Ryans ought not to be put back into possession of their interest in the property free and clear of any such incumbrance when there was an incumbrance of that kind on it when the contract was entered into. So if you should come to this ques-

580 tion of damages at all, you should ascertain the damages in this way. You should ascertain the value of this mining property—this property that was owned by the Turquoise-Copper Mining and Smelting Company—at the time the demand of the Ryans to be reinvested was made, if any such demand was made at all—ascertain first the value of that property. Then deduct from that value the amount of this claim of the Western Company which loaned this money, with interest, which at that time amounted to at least \$39,000. Then take that balance, if there is any—the value of the property, from which deduct the \$39,000, and if there is any balance left, that belongs to the plaintiffs and defendants in the proportion that they owned the property—that is, the Ryans four-sevenths and Tevis and McKittrick three-sevenths. So the Ryans would be entitled to four-sevenths of the balance after you deduct from the value of the property the amount of this Western Company's claim—this \$39,000. So, of course, it follows that if the value of the property was not so much as \$39,000, they would not be entitled to anything, because you cannot deduct \$39,000 from—\$30,000 we will say. So, if you find that the value is only \$39,000 or less than \$39,000, you would have to give a verdict for the defendants in any event. If you find that it is more than \$39,000, you would first have to deduct the \$39,000 from what you do find before you give the plaintiffs their proportion of the balance. Is that plain to you? If there is anyone that it is not plain to I would like to make it clear, for if you come to the question of damages it is important that you know what to do. As I say, the first

581 thing you have to do in ascertaining the damages is to fix on the value of the property at the time the demand was made. You have no right to guess at the value of this property. You have no right to say arbitrarily that you think this property is probably worth so much and we will call it so much; you must base your valuation on the evidence in the case. It won't do to guess about the property and say we think it is a valuable property and we will fix it at that amount anyway; you must have some basis for your valuation, and you must base it on the evidence in the case. It won't do to guess about anything of that kind, gentlemen. As I say, if you find the valuation to be less than \$39,000, in any event you bring in a verdict for the defendants; if more than \$39,000, deduct that from the amount you do find the value to be and give

the plaintiffs four-sevenths, provided you think the plaintiffs ought to be entitled to recover. But if you do not think they should recover, there is no reason to go into the question of damages at all.

I shall be here for a few moments in case you come to an agreement shortly, but if your deliberations are going to require considerable time I will arrange for you to go out and get something to eat and come back and deliberate afterwards. There is no provision for the country to pay for the meals furnished jurymen in civil cases and you will have to pay for your own suppers. When you come back—if you should not agree shortly—when you do agree upon a verdict, if you do agree you may seal up your verdict,

582 your foreman having signed it, and it may be put in an envelope and sealed up, and you may bring it back into

Court tomorrow morning all together. You may separate for the night if you agree upon a verdict and all come back into Court tomorrow morning and on the assembling of Court the verdict will be received. Of course if you do that, do not let anyone know what your verdict is until you hand it to the Court in the morning. Swear the bailiffs. (Two bailiffs duly sworn to take charge of the jurors during their deliberations.) I will hand two forms of verdict to your bailiffs. One provides that you find for the plaintiffs and assess their damages at blank dollars. Of course you will fill that in if you find for the plaintiffs. The other is that you find for the defendants—if you do find for the defendants under the instructions that I have given you, then your foreman signs that verdict.

Let a copy *a copy* of the minutes of the board of directors and the stockholder's meetings which Captain McKittrick has been filed with the Clerk in lieu of plaintiffs' exhibit B which the defendants have leave to withdraw.

(Thereupon the jury retires to consider of their verdict.)

583 TERRITORY OF ARIZONA,

County of Maricopa, ss:

I, J. S. Jenckes, Jr., Official Court Reporter of the District Court of the Third Judicial District of the Territory of Arizona, do hereby certify that, as such reporter, I was present at the trial of the above-entitled cause at Phoenix, Maricopa County, Arizona, on December 21st and 22nd, 1908, that I took notes of all oral applications, requests, orders, rulings, objections, actions, questions propounded to and answers of jurors and witnesses, and of such other matters as I was by the Court directed to note during the trial of said cause; that I have transcribed the same (with the exception of the questions propounded to and answers of jurors on their voir dire examination,) and the foregoing two hundred and twenty-two (222) pages of typewritten matter contain a true and correct copy of the same.

Witness my hand at Phoenix, this 21st day of June, A. D. 1909.

J. S. JENCKES, JR.,
Official Court Reporter.

584 In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

No. 5616.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs,

vs.

W. S. TEVIS and W. H. MCKITTRICK, Defendants.

I hereby certify the foregoing transcript to be correct, And I further certify in compliance with rule 2 of the Supreme Court of Arizona, that the foregoing extension of the reporter's notes consisting of 222 pages of typewritten matter is a true and correct transcript of the evidence and the whole thereof taken on the trial of the above entitled action and contains and embodies a true and correct statement of all the oral applications, requests, orders, objections, actions and questions propounded to witnesses and answers of witnesses and all the rulings, and all oral instructions given and made during the trial of said action, and the same is hereby approved and allowed as such and as a part of the record of said action, this 22nd day of July, 1909.

EDWARD KENT, *Judge.*

585 And on the same day, to-wit, the 5th day of August, 1909, came the appellants by their attorneys and filed in the Clerk's office of said Court in said entitled cause certain minute entries and bond, in words and figures following; to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona in and for the County of Maricopa.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs,

vs.

THE WESTERN COMPANY, a Corporation; W. S. TEVIS and W. H. MCKITTRICK, Defendants.

Be it remembered, That heretofore and on, to-wit, the 11th day of November, A. D. 1908, the same being one of the regular judicial days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in the above-entitled cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al., Plaintiffs,

vs.

W. S. TEVIS et al., Defendants.

At this day it is ordered that the motion of the plaintiff's attorney demanding a trial jury in the above-entitled action be and the same is hereby granted.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al., Plaintiffs,
vs.
W. S. TEVIS et al., Defendants.

At this day, by consent of both parties, it is ordered by the Court that this cause be set for trial December 21st proximo.

586 And afterwards and upon, to-wit, the 5th day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al., Plaintiffs,
vs.
W. S. TEVIS et al., Defendants.

At this day, this cause coming on to be heard upon the demurrer of the defendants herein to the third amended complaint of the plaintiffs, is argued by counsel, at the conclusion of which, and being now sufficiently advised in the premises, the court doth sustain said demurrer as to the first and second causes of action in said complaint and doth overrule said demurrer as to the third cause of action in said complaint.

And afterwards and upon, to-wit, the same day the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al., Plaintiffs,
vs.
W. S. TEVIS et al., Defendants.

At this day, this cause coming to be heard on motion of the said defendants to strike out certain clauses in the plaintiff's third amended complaint, is argued by counsel and being now sufficiently advised as to the premises, the Court doth grant said motion as to all of paragraph "II" in third cause of action after the word "contract" in the third line from the bottom of page 13, and words "hereinafter referred to" inserted in lieu thereof, and over-

587 ruled the same in all other respects.

And afterwards and upon, to-wit, the 21st day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day comes A. C. Baker, Esq., and enters his appearance herein as associate counsel for the defendants.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day comes A. C. Baker, Esq., and enters his appearance herein as associate counsel for the plaintiffs.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the plaintiffs in person and by their attorneys, Eugene S. Ives, Esq., Geo. Neale, Esq., J. T. Kingsbury, Esq., and Frank Cox, Esq., and the said defendants also come, and by their attorneys, Ben Goodrich, Esq., Chas. Bowman, Esq., and A. C. Baker, Esq. And thereupon this matter coming on for trial of the issues herein joined, comes the jury as follows: Frank Brown, 588 Wm. Smith, Fred Blackmer, W. A. Mouer, John W. Connelly, C. E. Tannehill, C. B. Turner, Reuben Hill, Arthur Wilson, F. E. Felch, Wm. Creighton, W. L. Teel, twelve good and lawful men, and they are duly selected and tried, empaneled and sworn to well and truly try this matter between Jepp Ryan et al., the plaintiffs, and W. S. Tevis et al., the defendants, and a true

verdict give according to the law and the evidence. And thereupon comes the opening statement by Geo. Neale for the plaintiffs and by Ben Goodrich for the defendants, as to what they expect to prove, after which comes the evidence which is continued till the noon recess and the jury is admonished by the Court that it is their duty not to converse among themselves or with any other person on any subject connected with this trial, or to form or express any opinion thereon until the matter is finally submitted to them, and they are allowed to separate to meet the court at its next incoming at 1:30 P. M. this day.

And afterwards and upon, to-wit, the same day the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the said defendants by their attorneys and ask leave of the court to be allowed to amend their complaint by interlineation, and the court, being sufficiently advised in the premises, doth grant said request.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come again the plaintiffs herein in person and by their attorneys, and the said defendants in person and by their attorneys also come, and thereupon come the jurors and upon being called by the Clerk all answer to their names, and being now present in the jury box, the trial of this cause on the issues herein joined is resumed, and continued till the hour of adjournment, and the jury is admonished by the Court as heretofore and allowed to separate to meet the Court at its next incoming at 9:30 A. M., December 22nd, instant.

And afterwards and upon, to-wit, the 22nd day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the plaintiffs in person and by their attorneys, Eugene S. Ives, Esq., Geo. Neale, Esq., W. J. Kingsbury, Esq., and Frank Cox, Esq., and the said defendants in person and by their attorneys, Ben Goodrich, Esq., and A. C. Baker, Esq., and Chas. Bowman, Esq., also come. And thereupon the jurors are duly called by the Clerk and all answering to their names and being now present here in the jury box, the trial of the issues herein joined is
590 resumed. And thereupon comes the further evidence on behalf of the plaintiffs at the conclusion of which the said plaintiffs by their attorneys rest their case, and the jurors are admonished by the Court as heretofore and excluded from the Court room, and the said defendants by their attorneys move the Court to instruct the jury to return a verdict in favor of the defendants, which motion is argued by counsel and submitted to the Court for further consideration, after which the jurors are brought back into Court and being duly called by the Clerk and all answering to their names, are now admonished by the Court as heretofore and permitted to separate to meet the court at its next incoming at 1:30 P. M. this day.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come again the plaintiffs in person and by their attorneys and the said defendants in person and by their attorneys also come, and thereupon the jurors are duly called by the Clerk and all answering to their names and being now present here in the jury box, the trial of the issues herein joined is resumed, and thereupon the said jurors are admonished by the Court as heretofore and excluded from the Court room and the motion of the defendants to instruct the jury to return a verdict in favor of the said defendants, having been duly considered by the Court, is
591 denied. And thereupon the jurors are brought back into court and upon being called by the Clerk and all answering to their names and being now present here in the jury box, the trial of the issues herein joined is resumed, and now comes the evidence on behalf of the said defendants until a recess at 5:25 P. M. for 5 minutes, and the jury is admonished by the court as heretofore

and allowed to separate to meet the court at its next incoming at 5:30 P. M. this day.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPPI RYAN et al.

vs.

W. S. TEVIS et al.

At this day come again the plaintiffs in person and by their attorneys and the said defendants in person and by their attorneys also come, and the jurors are duly called by the Clerk and being present here in the jury box the trial of the issues herein joined is resumed. And now comes the further evidence on behalf of the defendants which is continued until adjournment, and the jurors are admonished by the court as heretofore and allowed to separate to meet the court at its next incoming at 9:30 A. M., December 23rd, instant.

And afterwards and upon, to-wit, the 23rd day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

592

5616.

JEPPI RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the plaintiffs in person and by their attorneys and the said defendants in person and by their attorneys also come, and the said jurors are called by the Clerk and all answering to their names and being now present here in the jury box, the trial of the issues herein joined is resumed. And now comes the further evidence until the hour of noon recess and the jury is admonished by the court as heretofore and permitted to separate to meet the court at its next incoming.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

VS.

W. S. TEVIS et al.

At this day come again the plaintiffs in person and by their attorneys and the said defendants in person and by their attorneys also come, and the said jurors are called by the Clerk and all answering to their names and being now present here in the jury box, the trial of the issues herein joined is resumed, and the evidence is concluded, after which the jury is admonished by the Court as heretofore and excluded from the court room and thereupon defendants renew their motion to have the Court instruct the jury to return a verdict in their favor, which motion is argued by counsel and by the court denied, after which the plaintiffs move the Court to instruct the jury to return a verdict in favor of the plaintiffs and the court being fully advised in the premises doth deny said motion. And thereupon the jury is recalled and all answering to their names and being now present here in the jury box, the argument by the respective counsel is begun and concluded and the jury is instructed by the Court, both orally and in writing, the instructions being taken down in shorthand by the Court stenographer, after which two bailiffs are sworn to take charge of the jury and the jury retire to the jury room for deliberation.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

VS.

W. S. TEVIS et al.

At this day it is ordered by the Court that should the jury not have reached an agreement by the time the Judge leaves the court house, when they have reached an agreement they may sign their verdict, place it in a sealed envelope and give it to their foreman in charge, and that the same be returned into Court at 9:30 A. M., December 24th, instant.

And afterwards and upon, to-wit, the 24th day of December, A. D. 1908, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.
vs.
W. S. TEVIS et al.

At this day come the plaintiffs in their own proper persons and by their attorneys and the said defendants in person and by their attorneys also come, and thereupon comes into Court the Jury empaneled in this case and upon being called by the Clerk and all answering to their names and being now present here in the jury box, return into Court their sealed verdict, which is by the Court ordered recorded by the Clerk, and is in words and figures as follows, to-wit: "We the jury duly empaneled and sworn in the above entitled action upon our oaths do find for the plaintiffs and assess their damages at \$132,000. R. Hill, Foreman." And the verdict being so received and recorded is read to the jurors by the clerk, and they all replying to the Court that it is their verdict, it is accepted by the Court, and thereupon the jury is discharged from further consideration of this case, and it is ordered that a judgment be entered on the verdict herein, which when signed shall be entered in the judgment book.

And afterwards and upon, to-wit, the same day the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.
vs.
W. S. TEVIS et al.

At this day on motion of the defendants, the plaintiffs not objecting, it is ordered by the Court that execution of the judgment herein be stayed till disposition can be made of defendants' motion for a new trial.

And afterwards and upon, to-wit, the 20th day of January, A. D. 1909, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

595

5616.

JEPP RYAN et al.
vs.
W. S. TEVIS et al.

At this day this matter coming on to be heard on the motion of plaintiff to reform the judgment heretofore entered herein, come the

said plaintiffs by George Neal, Esq., their attorney, the defendants appearing by Ben Goodrich, Esq., their attorney, and not objecting to the motion, it is ordered that the said motion be and the same is hereby granted and the original judgment is vacated and it is ordered that a new judgment be signed against the said defendants and the Pacific Surety Company and the surety on the replevin bond as given by W. H. McKittrick to the extent of the bond.

And afterwards and upon, to-wit, the 17th day of April, A. D. 1909, the same being one of the regular juridical days of the October Term, A. D. 1908, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the said defendants by A. C. Baker, Esq., their attorney, and thereupon, pursuant to the written request of E. S. Ives, Esq., attorney for the plaintiffs herein, and now filed, and for good cause to the Court shown, it is ordered by the Court that the defendant's motion to set aside the judgment herein and for a new trial in this behalf, be continued until the next term of this Court, provided by law, and that it be set for hearing April 29th, instant.

And afterwards and upon, to-wit, the 29th day of April, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day this matter coming on to be heard upon the motion of the said defendants to set aside the verdict of the jury and the judgment rendered thereon, and for a new trial in this behalf, is argued by counsel, and by consent is submitted to the Court for its further consideration.

And afterwards and upon, to-wit, the 15th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia,

was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

This matter having been heretofore argued and submitted to the Court on motion of the defendants to set aside the verdict of the jury and the judgment of the Court, and for a new trial in this behalf, and by the Court taken under advisement, having considered the same, and being now fully advised in the premises, the Court doth deny said motion.

And afterwards and upon, to-wit, the 17th day of May, A. D. 1909, the same being one of the regular juridical days of the April Term, A. D. 1909, of said Court, the following order, inter alia, was made and entered of record in said Court in said cause, which

597 said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day come the said defendants by A. C. Baker, Esq., their attorney, and in open Court give notice of appeal to the Supreme Court of Arizona from the judgment rendered against them herein, and the order denying their motion for a new trial, and the Pacific Surety Co., surety, also gives notice of appeal to the Supreme Court from the judgment rendered against it.

And afterwards and upon, to-wit, the same day, the following order, inter alia, was made and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

5616.

JEPP RYAN et al.

vs.

W. S. TEVIS et al.

At this day on motion of defendants, it is ordered by the Court that the execution be stayed in this case for 60 days.

And afterwards and upon, to-wit, the 12th day of July, A. D. 1909, there was filed in the Clerk's office of said Court in said cause

a supersedeas appeal bond, which said appeal bond, with the endorsements thereon, is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

No. 5616.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs,
vs.
W. S. TEVIS and W. H. MCKITTRICK, Defendants.

Supersedeas Bond on Appeal.

Whereas, in the above-numbered and entitled cause pending in the District Court of the Third Judicial District of the Territory of Arizona, in and for the county of Maricopa, and at a regular
598 term of said Court, to-wit: On the 24th day of December, 1908, the said Jepp Ryan, T. C. Ryan and E. B. Ryan, recovered judgment against the said W. S. Tevis and W. H. McKittrick for the sum of One Hundred and Thirty-two Thousand (\$132,000.00) Dollars, with interest thereon from the 24th day of December, 1908, at six (6%) per cent per annum, and all costs of suit and also judgment against the Pacific Surety Company, a corporation for one hundred four thousand, nine hundred (\$104,900.) Dollars with interest thereon from the 24th day of December, 1908, at six (6%) per cent per annum on its replevy bond for the release of property seized under attachment in the said cause: And, whereas, on the 15th day of May, A. D. 1909, a motion therefor filed by the said W. S. Tevis, W. H. McKittrick and the Pacific Surety Company, a corporation, praying for a new trial, was overruled, to which action of the said Court, the said W. S. Tevis, W. H. McKittrick and the Pacific Surety Company, a corporation, then and there excepted and gave notice of appeal in open Court to the Supreme Court of the Territory of Arizona, from which said judgment and order the said W. S. Tevis, W. H. McKittrick and the Pacific Surety Company, a corporation, have taken an appeal to the Supreme Court of the Territory of Arizona, and desire to suspend the execution of said judgment during the pendency of said appeal. Now, therefore, we, W. S. Tevis, W. H. McKittrick, and the Pacific Surety Company, a corporation, as principals, and United Surety Company, a corporation, organized and existing under and by virtue of the
599 laws of the State of Maryland and duly authorized to do business in the Territory of Arizona, as surety, acknowledge ourselves bound to pay Jepp Ryan, T. C. Ryan and E. B. Ryan the sum of Two Hundred and Sixty-six Thousand (\$266,000.00) Dollars, (being double the amount of the judgment and costs) conditioned that the said W. S. Tevis, W. H. McKittrick and the Pacific Surety Company, a corporation, shall prosecute their appeal with effect and in case the judgment of the Supreme Court

of the Territory of Arizona, shall be against them, they shall perform its judgment, sentence or decree and pay all such damages as said Court may award against them upon the appeal.

Witness our hands this 10th day of July, A. D. 1909,

WILLIAM S. TEVIS,
W. H. McKITTRICK,
PACIFIC SURETY COMPANY,
By WALLACE EVERSON, *President*.
JOHN SIMPSON, *Assistant Secretary*.
UNITED SURETY COMPANY,
By JOHN H. ROBERTSON,
Resident Vice President.

Attest:

[SEAL.]

S. M. PALMER,
Resident Assistant Secretary.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 10th day of July in the year 1909, before me, a notary public, in and for said City and County, residing therein and duly commissioned and sworn, appeared—John H. Robertson, known to me to be the Resident Vice President and S. M. Palmer, known to me to be the Resident Assistant Secretary of the United Surety Company, the corporation that executed the within instrument and acknowledged to me that such corporation executed the same and that they sub-ribed the name of United Surety Company thereto as Principal and each his own name as Resident Vice President and Resident Assistant Secretary respectively.

OLIVER DIBBLE,

*Notary Public in and for the said City and County
of San Francisco, State of California.*

I have fixed the amount of the foregoing bond, including costs in the Supreme Court and the District Court at \$216,000.00 and approved the same, This the 12th day of July, A. D. 1909.

[SEAL.]

ELIAS F. DUNLEVY,
Clerk of the District Court of Maricopa County, Arizona,
By FRANK B. COOK,
Deputy Clerk.

The Governor of Arizona to Whom it May Concern:

Whereas, Section 415 of Chapter I of Title VIII of the Revised Statutes of Arizona (1901) provides: "That every company, before transacting any business under this act, shall deposit with the Governor of the Territory an authenticated copy of its charter or articles of incorporation and a statement, signed and sworn to by its president and secretary, showing its assets and liabilities. If the said Governor shall be satisfied that such company has authority under its charter or articles of incorporation to do the business provided for in this act, and that it has a paid up capital of not less than one

hundred thousand dollars, in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this act." And whereas, in accordance with the provisions of the said section of said statute, the United Surety Company, a corporation organized under the laws of Maryland, with its principal office in Baltimore, Maryland, 601 has applied to the Governor of Arizona for permission to transact the business of a surety company in Arizona, under the provisions of said Chapter I of Title VIII, and has deposited with the Governor of the Territory an authenticated copy of its charter as granted by the State of Maryland; and with said copy of said charter has deposited a statement signed and sworn to by its president and secretary, showing its assets and liabilities, and it appears that the said United Surety Company has a paid up capital of five hundred thousand dollars, and a surplus of one hundred and sixty two thousand and sixty dollars and 63 cents; and it appears that said company is able to keep and perform its contracts; Now, therefore, I W. F. Nichols, Acting Governor of Arizona, by virtue of the power and authority vested in me by law, and in accordance with the requirements of the said statute, do hereby grant unto the said United Surety Company authority to do business under the said act in this Territory.

In Witness whereof, I have hereunto set my hand and caused the Seal of the Territory to be affixed. Done at the Capitol at the City of Phoenix, this twenty-fifth day of February, nineteen hundred and eight.

By the Acting Governor:

[SEAL.]

W. F. NICHOLS.

LEW W. COLLINS,

Assistant Secretary of the Territory of Arizona.

#760.

Power of Attorney.

Know all men by these presents: That the United Surety Company, a corporation of the State of Maryland, by Henry G. Peniman, its President and R. A. Dobbin, Jr., its Secretary in pursuance of a certain resolution duly passed by the board of 602 directors of the said company at a regular meeting of that body held on the 31st day of May, 1906, a duly certified copy of which is hereto attached, does hereby nominate constitute and appoint Fred B. Lloyd, John H. Robertson and William V. Lloyd its Resident Vice Presidents and Edward B. Spengler and S. M. Palmer its Resident Ass't Secretaries at San Francisco, in the State of California, to make, execute and deliver on its behalf as Surety, and as its act and deed, Bonds and Undertakings to be given for the following purposes only, to-wit: Bonds of every description. Such bonds and other undertakings for said purposes, when duly exe-

cuted by either of the aforesaid Resident Vice Presidents and countersigned or attested by either of the aforesaid Resident Secretaries shall be binding upon the said Company as fully and to all intents and purposes as if such bonds and undertakings had been duly executed and acknowledged and delivered by the regularly elected officers of the Company.

In testimony whereof, the United Surety Company, has caused these presents to be signed by its President and its Secretary and its corporate seal to be hereunto affixed this 14th day of April, 1908, at the City of Baltimore, Maryland.

[SEAL.]

UNITED SURETY COMPANY,
By HENRY G. PENNIMAN,
President.

Attest:

R. A. DOBBIN, JR., Secretary.

At a meeting of the Board of Directors of the United Surety Company duly called and held on the 31st day of May, 1906, at the offices of the Company, City of Baltimore, State of Maryland, a quorum being present on motion, it was Resolved: That the President or Vice President, in conjunction with the Secretary or 603 Assistant Secretary, be and he is hereby authorized to appoint and empower Resident Vice President and Resident Asst Secretary of the Company to execute and deliver on behalf of the Company any Bond, Policy, or Undertaking, which the Company is authorized by law to issue.

STATE OF MARYLAND,

City of Baltimore, ss:

I, R. A. Dobbin, Jr., Secretary of the United Surety Company do hereby certify that the above and foregoing is a full, true, and correct copy of a resolution adopted at a meeting of the board of directors of said company held on the 31st day of May, 1906, as the same appears on the records of the company now in my possession and custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company at the City of Baltimore, this 14th day of April, A. D. 1908.

[SEAL.]

R. A. DOBBIN, JR., Secretary.

Statement of the Condition of the United Surety Company, as of December 31st, 1908. (As Filed with the Treasury Department of United States of America.)

Assets.

Real estate acquired by purchase.....	\$250,000.00
Railroad and other bonds.....	6,430.00
Other stocks	207,000.00
Cash in Bank and Home Office.....	177,924.38

Premiums less than ninety days old due from agents	
less commission	64,287.57
Loans on Mortgages.....	6,000.00
Loans on Collateral.....	109,474.32
Accrued Interest	2,812.76
604 Windsor Trust Company.....	5,968.70
Advance on contracts.....	22,003.48
Open Re-insurance accounts.....	88,962.83
Total.....	<u>\$940,864.04</u>

Liabilities.

Capital Stock paid in cash.....	\$500,000.00
Premium reserve requirement.....	240,868.92
Reserve for claims undergoing examination.....	11,017.44
Reserve for claims proof not filed.....	12,372.24
Reserve for claims in suit.....	16,059.50
Surplus	145,291.04
Due for return premiums and re-insurance.....	5,254.90
Estimated reserve for taxes, etc.....	10,000.00
	<u>\$940,864.04</u>

STATE OF MARYLAND,
City of Baltimore, ss:

I, J. William Hill, Treasurer of the United Surety Company do hereby certify that the foregoing is a true statement of the assets and liabilities of said Company as of December 31, 1908, taken from the books and records of said company.

In testimony whereof, I hereunto sub-cribe my name and affix the seal of said company, this second day of January, A. D. 1909.
[SEAL.] J. W. HILL, *Treasurer.*

STATE OF MARYLAND,
City of Baltimore, ss:

On this 30th day of January, A. D. 1909, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came J. William Hill, Treasurer of United Surety Company, to me personally known and being by me duly sworn, deposeth and saith, that he is the said officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company;
605 and that the foregoing is a true statement of the assets and liabilities of said company at the close of business, December 31, 1908, taken from the books and records of said company; and that said company has not since said 31st day of December, 1908, sustained any losses affecting its financial condition.

In testimony whereof, I have hereunto set my hand and affixed

my official seal at the city of Baltimore, this 30th day January, 1909.

[SEAL.]

HARRY E. MILES,
Notary Public.

Endorsements: 5616. In the District Court of the Third Judicial District of the Territory of Arizona, in and for the county of Maricopa. Jepp Ryan, T. C. Ryan, and E. B. Ryan, plaintiffs, vs. W. S. Tevis and W. H. McKittrick, defendants. Supersedeas Bond on Appeal. Approved and filed July 12, 1909. Elias F. Dunlevy, Clerk. Frank B. Cook, Deputy Clerk.

TERRITORY OF ARIZONA,
County of Maricopa, ss:

I, Elias F. Dunlevy, Clerk of the District Court of the Third Judicial District of the Territory of Arizona, in and for said County, do hereby certify that the above and foregoing contains a true copy of all minute entries made in the above-entitled case and of the supersedeas bond on appeal, and that the papers transmitted herewith are all the papers constituting the record of the case. Witness my hand and the seal of said Court this 5th day of August, A. D. 1909.

[SEAL.]

ELIAS F. DUNLEVY,
Clerk of said District Court.
FRANK B. COOK,
Deputy Clerk.

606 And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. Ben Goodrich for appellants, it is ordered by the Court that oral argument be granted in this cause, and the hearing set for January 20th, 1910.

And on to-wit: the twentieth day of January, 1910, being one of the regular juridical days of the January Term of said Court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

On motion of Mr. A. C. Baker, it is ordered by the Court that he be granted permission to make corrections in appellants' reply brief.

And on the same day to-wit: the twentieth day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for hearing was argued by Mr. Ben Goodrich for appellants and Mr. Eugene S. Ives for appellees, and the time for adjournment having arrived, it is ordered by the Court that the argument in this cause be continued until tomorrow morning.

And on to-wit: the twenty-first day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause having been continued from yesterday and coming on now for hearing, argument was concluded by Mr. A. C. Baker for appellants, and cause ordered submitted.

And on to-wit: the second day of April, 1910, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

608 And afterwards and upon, to-wit: the 2nd day of April, 1910, there was filed in the clerk's office of said Court in said entitled cause a certain opinion, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COMPANY, Defendants and Appellants,

vs.

JEPPI RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees.

Appeal from the District Court of Maricopa County.

Honorable Edward Kent, Judge.

Reversed.

Messrs. Ben Goodrich, A. C. Baker and Charles Bowman for appellants.

Messrs. Eugene S. Ives, Neale & Sutter and J. T. Kingsbury for appellees.

Opinion by Lewis, J.

This is an action brought to recover damages for breach of contract. The facts in so far as essential to determination of the case are as follows: In November, 1902, the Turquoise Copper Mining

& Smelting Company, a corporation, was the owner of certain mining claims in Cochise County, Arizona. At that time its property had been sold for approximately \$23,000, upon an execution in aid of a judgment, to one T. B. McPherson. The time for redemption was to expire January 31st, 1903. Upon November 29th, 1902, a conference was held between W. H. McKittrick, one of the appellants, and the appellees which resulted in the execution of an agreement between the appellants and the appellees, the alleged breach of which is the subject matter in suit. This agreement may be summarized thus: Whereas the parties above mentioned represent all

the stock in the Turquoise Copper Mining & Smelting Company, a corporation, and whereas the first parties, (the appellants) now own and control three-sevenths of the capital stock of said corporation and the parties of the second part (the appellees) four-sevenths of the capital stock thereof and whereas the first parties are desirous of securing the controlling interest of the said capital stock of said corporation and thereby obtaining the full management of the affairs of the said corporation.

Now, therefore, in consideration of the conversion of the capital stock from its original capitalization to one million shares of the par value of one dollar (\$1.00) each and the placing of 240,000 shares of said capital stock in the treasury of the company to be sold in whole or in part by the said first parties at such price or prices as the board of directors of said corporation may deem advisable, the moneys to be used first to pay off a certain judgment held by T. B. McPherson and second to develop the claims of the company, the second parties agree that the officers of the company now representing the second parties shall resign; permitting the first parties to choose officers as they may desire; said second parties further agree to give the first parties as their interest in the company 280,500 shares of the capital stock; the second parties to receive 279,500 shares; the remaining 200,000 shares to be issued to W. H. McKittrick, as trustee, and to be divided between the parties in the proportion of 101,000 to the first parties and 99,000 shares to the second parties. All of the parties agree to use their best endeavors

to sell the trust stock at not less than par. the proceeds to be divided pro-rata until reimbursed for the money then expended upon the property, when the remaining shares shall be divided between them according to their respective interests in the ratio aforesaid. It is further agreed that none of the individual holdings shall be sold until the trust stock has been sold or apportioned and that the second parties shall not be liable for any expense connected with the operation of the company except the expense of selling the trust stock.

The contract then concludes: "It is further agreed that the parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure

of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." This clause has been denominated by counsel as the "reinvestment clause" and for convenience will be so referred to hereinafter.

Pursuant to the terms of this contract, the appellees resigned from the management. The appellants thereupon assumed control and selected directors and officers. The articles of incorporation were amended changing the capital stock from 100,000 shares at
611 \$10 each to a million shares at \$1.00 each. The old certificates of stock were surrendered, cancelled and new certificates issued, the appellees receiving and ever since holding 279,500 shares. The reorganization of the company was not effected until January 26th, 1903 and in order to obtain the necessary funds with which to redeem from the sale to McPherson, the corporation borrowed \$30,000 upon its note, from W. S. Tevis, one of the appellants. This note was subsequently transferred to the Western Company. McKittrick, acting for the corporation, redeemed the mines from the sheriff's sale to McPherson. Thereafter, 32,000 shares of the treasury stock *was* sold for 25 cents a share, netting the corporation \$8,000 which funds were used by the corporation for further development of the mines. The interest upon the \$30,000 note in the hands of the Western Company was met by additional funds borrowed from Tevis for which notes were given and these notes transferred to the Western Company. On May 16th, 1904, the balance of the treasury stock 208,000 shares was sold for three-fourths of a cent a share. Some time subsequent to November 29th, 1904, an action was commenced by the Western Company in Kern County, California, to recover upon the promissory notes given by the corporation and upon May 24th, 1905, judgment was by it obtained for \$44,078.05. The evidence tends to show that prior to the obtaining of such judgment a demand was made upon the appellants by the appellees to be reinvested with their interests in the property. This

612 demand was ignored by the appellants. Shortly thereafter an action was commenced upon the judgment of the Western Company in Cochise County in which judgment was rendered against the Turquoise Company for \$44,549.43 upon July 20th, 1905. At the same time W. H. McKittrick obtained a judgment against the corporation in Cochise County for \$9,975.00 for services rendered to the corporation as general manager. This judgment was transferred to the Western Company. On August 12th, 1905, the sheriff of Cochise county sold the properties of the corporation on an execution issued upon the Western Company's judgment to the judgment creditor and, the property not being redeemed, on July 11th, 1906, a sheriff's deed conveying the property to the Western Company was issued. On July 20th, 1908, the Western Company deeded the properties to the Tejon Mining Company incorporated by the appellants. A written demand, the date of which does not appear, was made upon the appellants by the appellees some time after the issuance of the

sheriff's deed to the Western Company. Thereafter the appellees filed suit in the court below to recover damages arising from the refusal of appellants to reinvest them with a four-sevenths interest in the property, in the sum of \$200,000.00. The case was tried to a jury and a verdict returned in favor of the appellees. Judgment was entered on the verdict against the appellants Tevis and McKittrick in the sum of \$132,000 and also against the Pacific Surety Company, surety for the appellants upon a bond theretofore given in said cause, for the sum of \$104,000. Motion for new trial was made, which motion was denied and thereupon this appeal was taken and perfected.

613 The principal question is as to the correctness of the instruction of the trial court as to the measure of damages. "You shall ascertain the value of the property at the time that the plaintiffs demanded that defendants reinvest them with their interests therein. You should deduct therefrom the amount of of the claim of the Western Company with interest, to-wit, \$39,000 and then award the plaintiffs four-sevenths of the balance remaining."

The true measure of damages is dependent upon the interpretation of the words in the contract contained in the reinvestment clause: "The interest of the second party shall reinvest in them in the same proportion and ratio as they were held and were possessed at the signing of this agreement." Counsel for appellants argue that the word "interest" necessarily means stock and could not under any circumstances mean property. Counsel for appellees urge that the word "interest" is more comprehensive than "stock;" that the ownership of an interest may or not be ownership of stock and that the meaning to be attached to it must depend entirely upon the conditions prevailing at the time when it became the duty of Tevis and McKittrick to reinvest the Ryans.

In interpreting the word "interest," we should not separate it from its context, nor should we consider it apart from other provisions which may throw light upon its meaning. We are called to view this contract as an entirety and determine from the internal evidence it affords, the meaning to be attached to the word.

614 O'Brien v. Miller, 168 U. S. 287-297; Pressed Steel Car Co. v. Eastern Ry. Co. 121 Fed. 609. Reviewing the contract, we find the parties represent all of the capital stock; the parties of the first part, (appellants) own and control three-sevenths of the capital stock; the parties of the second part, (appellees) four-sevenths of the capital stock; the parties of the second part are desirous of securing the controlling interest of the said capital stock; the appellees give to the appellants part of their stock holdings upon certain conditions and agreements to be by them performed and it concludes: "Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement." To give the word "interest," the meaning of interest in property in preference to interest in the

capital stock is to deprive the word "reinvest" of force, for it implies a previous divestiture. It is to destroy the significance of the concluding clause: "in the same proportion and ratio as they were held and were possessed of," for there was never a holding or possession by them of the property of the corporation as such.

We give a proper legal meaning to the word interest by interpreting it as interest in the capital stock. If the word be used in a sense less accurate, we must still deem it to be used in its proper

615 legal sense, unless such interpretation as tested by the specific circumstances under which it is used would result in the absurdity of rendering it unmeaning. In that case by construction it would be proper to place upon it the less accurate meaning evidently intended by the parties as shown by the circumstances giving rise to its use. The circumstances in evidence under which the contract was executed may be briefly stated. The corporation was involved financially; its property had been sold under execution; the time for redemption was about to expire; the purchaser under the execution sale was taking his certificate of sale in trust for the holders of the majority of the stock of the corporation. A corporate meeting was being held. The holders of the minority interest in the capital stock accused the holders of the majority interest of an attempt to "freeze them out." This was denied, and as evidence of good faith the majority interest entered into this agreement. Applying the language of the contract to the situation as it then existed, its construction is the same as the interpretation heretofore given. The contract contemplated selling stock of the corporation to the public. It would have been impossible for the appellants, acting in good faith with the stockholders so secured, to have, upon the failure of their plans, divested the corporation of the title to the mines and invested appellees with a four-sevenths interest therein. To hold that the contract required a return of a four-sevenths interest in the property would call for the assumption that the parties had it in mind if the scheme failed that the appellants would invest the appellees with title to a four-sevenths interest in the property as against a corporation of which they were

616 majority stockholders as well as directors and officers. This would contemplate placing the appellants in a position where their pecuniary interest would clash with their duties. The reasoning of the cases which hold that all agreements for pecuniary consideration to control or influence the conduct of directors, stockholders or agents of corporations charged with duties of a fiduciary character to private parties, are against the true policy of the state, which is to secure fidelity in the discharge of such duties, is applicable. *Woodstock Iron Co. v. Richmond & Danville Extension Co.* 129 U. S. 643.

We therefore refuse to adopt a construction which would tend in any wise to so influence the action of the appellants in their fiduciary relation where we have the reasonable alternative of so construing the contract as to enable the appellants to act free from such malign influence.

Nor in reaching this conclusion have we lost sight of the further contention of the appellees that even though the word "interest" be

not construed to mean "property" it should be construed to include a restoration to the appellees of the management and control of the corporation. The placing of this meaning upon the word "interest" is inconsistent with the distinction which the parties themselves have made in the contract itself, wherein the appellees agree "that the officers of said corporation representing their interests" should resign and allow the appellants to select such officers as they may desire. The holding of office is not identified with interest,

617 but is clearly distinguished therefrom.

The appellants contend that the trial court by adopting the measure of damages at a four-sevenths interest in the property of the corporation construed the reinvestment clause to extend to the property or the mines of the corporation. Such result does not necessarily follow.

There are various tests for determining the value of stock in a corporation. In the absence of any other evidence of value, the par value is presumptively the value of the stock. Appeal of Harris, 12 Atl. 753, Brinkerhoff v. Savings Bank, 118 Mo. 447, 24 S. W. 129. In this case, however, evidence was introduced tending to show the insolvency of the corporation, the value of its property and its liabilities. This evidence may be properly looked to for the purpose of determining the value of the stock of the corporation. "There is no better or safer criterion to determine the value of stock of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities." Nelson v. First National Bank, 49 Fed. 798. The instruction of the trial court is tantamount to an instruction that the appellees were entitled to the value of four-sevenths of the capital stock of the company which was the equivalent of and was to be ascertained by determining from the evidence the value of four-sevenths of the net assets of the corporation. That this was the meaning of the trial court appears clear from reading the oral instruction wherein frequent reference is made to the

duty of appellants to reinvest appellees with their interest in
618 the company. When the result is right, though the method of reaching it is wrong, and though the jury may have found their verdict on an incorrect theory of the case the error is harmless and the judgment will not be reversed. Decatur Bank v. St. Louis Bank, 88 U. S. 294, 22 L. Ed. 560, Chicago M. & St. P. Ry. Co. v. Ross, 112 U. S. 37, 5 Sup. Ct. 184, 28 L. Ed. 787; Drygoods Co. v. Malcolm, 58 Fed. 670, 7 C. C. A. 426, 19 U. S. App. 229.

It is urged, however, that there is manifest error in this instruction as so construed for the reason that the complaint does not allege that the plaintiffs have been deprived of their four-sevenths interest in the capital stock of the Turquoise Company, but that the plaintiffs have been defrauded of their four-sevenths interest in the property of the said company. We find no difficulty in this. A reading of the entire third cause of action in the complaint upon which the case was tried, makes it clear that the appellants have defined their interest in the property to be a four-sevenths interest in the capital stock of the company. This is the fair and reasonable intendment of the pleading. It is the construction evidently placed upon it by the trial court. It accords with the evidence introduced and the

instruction given. We therefore adopt such construction. *Phillips v. Smith*, 95 Pac. 91. (Ariz.)

Another and more serious question as to the true measure of damages arises upon the evidence showing that at the time of the alleged breach, May 1905, the plaintiffs were in the possession of 279,500 shares which had been retained by them under the 619 terms of the contract. We have already held that the sole breach consisted in the failure to reinvest the Ryans with their former interest, namely four-sevenths of the capital stock. Was the measure of damages fixed by the court erroneous in not eliminating from the instruction given, the 279,500 shares so held by the Ryans?

The appellees' reply to this question is two-fold.

First, That the avowals by counsel concerning the theory upon which the case was tried, precludes them from objecting now to the court's instruction in accordance with such avowal and theory. This avowal occurred at the threshold of the trial upon an objection to proffered testimony as to the amounts advanced by the respective parties for the benefit of the properties and was elicited by the suggestion of the court that in its opinion, it was competent under the pleadings to show the interest these people had in the property. Counsel for appellants in further urging the objection to this evidence stated: "This suit is simply for the purpose of recovering the value of four-sevenths of the stock of the corporation. There is nothing said about \$160,000. The Court: It is referred to in the complaint. COUNSEL: But this action is not to recover any part of that (the \$160,000). The damage is simply as to the value of four-sevenths of the stock only."

There is an abundance of authority and it is a familiar rule of appellate practice that a party will not be permitted on appeal to abandon the theory of a case to which he has assented, upon the trial and substitute another. The reason of the rule is to 620 be found in the injustice of permitting a case tried and determined on assumptions adopted and acquiesced in as proper by both parties and followed by the court, to be retried upon appeal without regard thereto. In the trial of a cause, the admissions of counsel are constantly received and acted upon. In fact, as bearing upon the issue involved, admissions of counsel may be the ground of the court's procedure equally, as if established by the clearest proof. Of course nothing should be taken against the party making the statement or admission when made, without full consideration. Mere unguarded expressions of counsel or ambiguous statements, should never be the basis of the court's action. Otherwise this salutary rule would become a medium of injustice.

There is a marked difference between the theory of a case and the extent of recovery to be allowed under a given theory.

While it is true that the court subsequently indicated an adoption of the value of the stock as the measure of damages, nowhere, after a careful examination of the record, do we find a concession by the appellants that if the appellees are entitled to damages, they are entitled to such damages to the extent of the value of four-sevenths

of the capital stock. There is naturally but little in the record with reference to the stock retained by the Ryans. It is conceded that it was so retained. We do find, however, cross examination of Jepp Ryan tending to show that the stock was still owned by the Ryans and that it has been deposited as collateral for loans obtained by them.

621 A fair interpretation of counsel's language is that it is an admission of his view of the theory of appellees' claim as set forth in their complaint. It is not, however, reasonably to be construed as an admission of the theory or fact that if they were entitled to damages, the extent of such damage was the value of four-sevenths of the capital stock. We therefore hold that there is no such admission as to the measure of damages as would preclude the appellants from questioning here the instruction given.

Second, The appellees further urge that the trial court was correct, because the appellants deliberately refused to fulfill their contractual obligation and wrongfully continued to control and manage the property and as a result thereof the assets of the corporation were wholly lost and the value of the entire stock destroyed. They say it does not lie in the mouth of the appellants to assert that if they had passed the control to the Ryans the same loss would have occurred. They rely upon the *principal* that where a party has breached a contract, he will not be permitted in the action to recover damages therefor to defend upon the ground that the party would not or could not have availed himself of the contract and cite the cases of *Hampton Stave Co. v. Gardner*, 154 Fed. 805, and *Griggs v. Day*, 52 N. E. 697-8, 158 N. Y. 1. This contention, however is based upon a premise which has already been eliminated. There was no duty upon the part of the appellants to restore to the appellees the management and control of the corporation, except

622 insofar as a right to management and control would flow from a restoration to them of a majority of the capital stock and there is no showing that a corporation election would have been held in the interval between the breach and the loss of the assets. But assuming that the right to control and manage the corporation would flow from a reinvestment of the appellees with such majority of the capital stock and that such election might have been held, the *principal* applied in the cases cited has no application here. A consideration of one, will distinguish the two cases cited. In the case of *Hampton Stave Co. v. Gardner*, *supra*, the Stave Company broke a contract wherein they had agreed to sell Gardner certain land. Gardner sued to recover damages in the amount of the difference between the purchase price and the value of the property at the time of the breach. Judgment was recovered by Gardner. It was contended by the vendor that Gardner would not have taken and paid for the land if the contract had been fulfilled. The court refused to admit evidence offered by the vendor to this effect and says: But that evidence was immaterial. What the parties would have done if the vendor had not violated its agreement was a speculative and irrelevant issue. It had committed the first breach of the contract and had thereby given the vendee the right to re-

cover the legal damages which resulted from its wrong * * *. The measure of damages for its breach of this covenant in the contract was the natural and probable loss which the vendee would sustain on account of that breach and that was the value of the option, the difference between the value and the contract price of the land, and the vendor could not lawfully take advantage of its own wrong with proof that the vendee would not have realized this value if it had performed its covenant."

623 This statement of the court is correct and had the appellants in the case at bar sought to prove that if they had returned this stock the appellees would not have assumed control, but would have permitted the property to be lost as it was lost, such evidence would have been immaterial and would properly have been rejected by the trial court. This they did not seek to do.

The appellants' contention is that they are only answerable under the pleadings in this action for the value of the stock withheld by them, the direct and proximate damage resulting from their breach of the contract.

The proximate damage resulting from the breach of this contract was the loss of the value of the stock to be returned. This was contemplated by the contract and appellants should answer therefor. The loss of the value of the 279,500 shares of stock was a remote and indirect result of the breach and not such as the appellants must have had in contemplation at the time of the execution of the contract, as the probable result of such breach. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540-4.

It cannot be said that the mere retention of the stock by the appellants in and of itself caused the loss of the assets of the corporation. The loss of the assets of the corporation was due not to the breach of the contract, but to independent acts of the appellants subsequent to such breach.

624 The court was in error in instructing the jury so as to permit a recovery of this remote damage. We do not hold nor is it to be implied that the appellees have no remedy for such loss, but such remedy is not to be found in the case as now before us.

The remaining questions presented by the assignments of error do not require a reversal of the judgment of the trial court. The sole error found to exist consists in the instruction permitting the jury to find a larger amount of damages than was warranted. The evidence and the verdict of the jury affords us a basis for the computation of the correct sum to be awarded appellees. The jury by its verdict found, in effect, that the value of the entire capital stock of one million shares of the Turquoise Copper Mining and Smelting Company at the time of the breach of the contract was \$231,000.00. We have held that the appellees were entitled to recover the value of four-sevenths of this stock less the 279,500 shares retained by them, namely, the value of 291,928 shares, which, being computed upon the basis afforded by the verdict of the jury, is \$67,435.37. Under the provisions of paragraph 1588 of the Revised Statutes of 1901, and the practice approved in *Kennon vs. Gilmer*, 131 U. S. 22, it is therefore ordered that should the appellees elect to file a remittitur

in this court within twenty days hereafter, in the amount of \$64,564.63, judgment shall be entered in this court in favor of the appellees and against the appellants and the sureties upon the bond on appeal, and against the Pacific Surety Company, surety upon the bond given in the court below, in the sum of \$67,435.37 with costs in the trial court, and that the costs of this appeal be awarded to the appellants; otherwise, let the judgment be reversed and the cause be remanded for a new trial.

ERNEST W. LEWIS,
Associate Justice.

We concur:

JOHN H. CAMPBELL,
Associate Justice.

EDWARD M. DOE,
Associate Justice.

Fletcher M. Doan, Associate Justice, not sitting.

And on to-wit: the second day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1124.

W. S. TEVIS, W. H. McKITTRICK, and THE PACIFIC SURETY COMPANY, Appellants,

vs.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Appellees.

This cause having been heretofore submitted, and by the court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that should the appellees elect to file a remittitur in this court within twenty days hereafter, in the amount of Sixty-four Thousand Five Hundred Sixty-four and 63/100 (\$64,564.63) Dollars, judgment shall be entered in this court in favor of the appellees and against the appellants and the sureties upon the bond on appeal, and against the Pacific Surety Company, surety upon the bond given in the court below, in the sum of Sixty-seven Thousand Four Hundred Thirty-five and 37/100 (\$67,435.37) Dollars, with costs in the trial court, and that the costs of this appeal, taxed at three hundred fifty-three and 70/100 (\$353.70) dollars be awarded to the appellants; otherwise the judgment of the District Court is reversed and the cause remanded for a new trial.

And afterwards and upon, to-wit, the 12th day of April, 1910, come the appellants by their attorneys and file in the clerk's office of said Court in said entitled cause a certain motion for rehearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees,

vs.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COMPANY, Defendants and Appellants.

Petition for Rehearing.

To the Honorable the Justices of the Supreme Court of the Territory of Arizona:

And now again come the appellants by Ben Goodrich, A. C. Baker, and Charles Bowman, their attorneys, and petition this Honorable Court for a rehearing of this cause; and they state the following grounds for said rehearing:

First. The court has failed to pass upon errors assigned and argued by the appellants relating to the improper admission of evidence. There is manifest error in the decision of this court in failing to determine the questions so raised. (a). It is evident from the opinion of this court that the court determined the contract "when applied to the situation as it then existed" to be free from ambiguity, and Your Honors held that it was necessary in interpreting the word "interest" used in the reinvestment clause to "determine from the internal evidence it (the contract) affords the meaning to be attached to the work." This being true, it necessarily follows that all oral evidence introduced by the appellees seeking to vary and enlarge the appellants' contractual undertaking was improperly admitted in evidence. The court has expressed no opinion upon this error assigned and argued. (b). The court below admitted in evidence an instrument briefly referred to as Exhibit "K." That its reception in evidence was error of that there can be no doubt. The authorities cited by us in our opening brief on pages 82 to 89 abundantly demonstrate the error. But this court failed to pass upon this error assigned. In the view taken of this case by the court, the admission of this evidence, (oral testimony as to the contract and Exhibit "K"), cannot be considered harmless error, and only by treating it as such could a decision thereof, and a reversal of the entire case, be avoided. The United States Supreme Court has repeatedly declared the rule relating to harmless error: "Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not, and could not, have prejudiced the party's rights."

Gilmer vs. Highly, 110 U. S. 47, 50.

Vicksburg vs. Mer. R. Co. 119 U. S. 103.

Mexia vs. Oliver, 148 U. S. 664, 673.

And Justice Sanborn, speaking for the United States Court of Appeals of the Eighth Circuit: "The presumption always is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice and

629 could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable."

United States vs. Gentry, 119 Fed. 70.

And the United States Court of Appeals for the Ninth Circuit said: "Material evidence erroneously admitted in a trial before a jury is always reversible error, unless it can properly be said that such admission was, without doubt, without injury."

United States vs. Honolulu Plantation, 122 Fed. 581.

The evidence being erroneously admitted, the presumption prevails that the error produced prejudice, it affected the verdict as an entirety, and this presumption can only be overcome if it "appears so clear as to be beyond doubt that the error did not and could not have prejudiced" the appellants. Tested by this rule a brief consideration of the evidence erroneously admitted not only fails to overcome this presumption of prejudice, but it affirmatively shows that the evidence in all human probability had a malignant and pernicious influence upon the mind of the jury. In trials before a jury it is of primary importance to prevent any matter which may have a tendency to create prejudice or bias in the minds of the jurors against either party from being submitted to them. The oral evidence complained of clearly had such tendency.

This court has determined the liability of the appellants to be for 291,928 shares of stock converted into a money demand, and has fixed the value thereof from the value of the property of a corporation as presumably found by the jury. The decision of this court cannot stand unless it is clear beyond all doubt that
630 the value of the property of the corporation was determined by the jury free from all malign influence. Now the pith of the evidence complained of is illustrated in the testimony of the appellee Jepp Ryan: "Now, he says, boys, Mr. Tevis is a multi-millionaire and rich and influential, and by putting him in control of this property, or giving us control of the property, he will try to handle it so each of us can get all of our money back. I says, Captain, suppose you don't handle it, where do we come in? He says if we don't sell the stock, we will return to you the property the same as it is today." (Ab. Rec. 234.) Substantially the same evidence is repeated in the testimony of Thomas Ryan, (Ab. Rec. 261), of E. B. Ryan, (Ab. Rec. 290, 291), and of P. B. Soto, (Ab. Rec. 298, 299). The value of the mines (the property of the corporation) was controverted. The appellees contended the value of the mines to be \$400,000; the testimony of appellants' expert placed the value at \$50,000.00. The evidence of the appellants appears of more merit. With an indebtedness of about \$25,000.00 against it, the appellees were unable to do anything with the mines. Well might the jury have found the value at the lesser amount. But the oral evidence complained of, "Tevis is a multi-millionaire," "we will return to you the property as it is today," had a clear tendency to create a bias and prejudice in the minds of the jurors, and it cannot be said that it "clearly appears beyond doubt" that this oral evidence failed to influence the jury in resolving any uncertainty which

they may have had as to the value, in favor of the appellees.
631 It was a means of bringing before the jury, repeated four times, the pecuniary standing of the appellant Tevis, which alone always constitutes reversible error. The contract being determinable, under the decision of this court, "from the internal evidence it affords," this testimony was inadmissible, and far from removing beyond doubt that the error did not and could not have prejudiced the appellants, reversible error patently appears. The judgment of this court is based upon a verdict tainted with error.

It cannot be said that the error was cured by this court requiring the appellees to remit part of the verdict, for if this action had been brought to recover the value of 291,928 shares, which this court found the appellees entitled to recover, the evidence complained of would have been inadmissible, and its reception in evidence reversible error. Only if the value of the property of the corporation had been undisputed could it be said that the error was harmless. The like is true of the document Exhibit "K." Its only purpose was to arouse a passion and prejudice in the minds of the jury against the appellants, and in favor of the appellees, and it cannot be said that it appears beyond doubt that its damaging self-serving declarations failed to exercise a subtle influence upon the jury in determining the value of the property. We believe we pointed out in our opening brief the fatal error in receiving it in evidence, (appellants' opening brief, pages 82 to 89), and the petitioners again respectfully refer to the argument. It is manifest that the court failed to con-

632 sider the errors so assigned, erroneously assuming the same cured by ordering the appellees to remit part of the judgment of the court below. But this court properly having held the contract to be determinable from the internal evidence, if no other fact were necessary to be determined by the jury except the value of certain shares of stock, the appellants are entitled to have that value found at a trial free from the pernicious influence of evidence having the likelihood of arousing the passion and prejudice of the jury. "The error which was so committed is manifest. The admission of incompetent evidence could not be cured in any such way. The verdict rendered is based on the whole of it, good and bad, and there is no means of knowing by what items the jury were influenced, or how far the items which are now allowed were accepted by them, or entered into their calculations. As it stands, the verdict is judge made; the only virtue in it being that it is within the amount assessed by the jury. But that coincidence does not help it, the amount so found being the result of evidence improperly submitted for their consideration, the only remedy for which was to grant a new trial."

Jayne vs. Loder, 149 Fed. 23.

Where improper evidence has been admitted the verdict cannot be cured by a remittitur. It is impossible for the court to say what influence the improper evidence may have had upon the minds of the jurors. "This (to remit) should never be allowed where the error may have had an influence upon the general verdict."

Galveston R. Co. vs. Wesh, 85 Tex. 431 (22 S. W. 957.)

633 This court has accepted the verdict of the jury as establishing the value of the stock, it has based its decision upon that finding. It is, therefore, important to scrutinize the verdict, and, if possible, trace the method of reasoning or motive that may have prompted the jury in the finding of the amount of damages, and if in so doing it fails to appear beyond all doubt that the jury may not have been actuated or influenced by evidence improperly in the record, then, of course, the judgment of this court cannot stand. It is suggested by this court that the value of the entire capitalization of the corporation was found by the jury at \$231,000.00. The value of the property of the corporation was claimed by the appellants to be \$50,000.00, and by the appellees \$400,000.00. The verdict is not based upon either contentions, it is between the two amounts, the result of compromise. Computation will reveal the fact that the jury fixed the damages rather upon the incompetent and irrelevant testimony of the oral undertaking of the appellants, ("we will see that you get your money back whether we come up with this contract or not"), than upon any other standard disclosed in the record. The evidence showed that the appellees had invested about \$90,000.00 in the mines, and that this amount had been invested prior to April or May, 1902, (before the recovery of the Bryant judgment under which the property was sold to McPherson). The verdict was rendered by the jury December 24, 1908. In other words a period of somewhat more than six and a half years had elapsed since the appellees had invested their \$90,000.00,

634 which according to the oral testimony the appellants had undertaken to return. Add to this amount interest thereon for a little over six and a half years at seven per centum, and the astounding figure of \$132,000.00 is approximated. May it not be true that in fixing the damages the jury was actuated by the evidence, "We will see that you get your money back," and sought to reimburse, compensate, the appellees according to the oral undertaking of the appellants? It is true that seven per cent is not the legal rate of interest, but it is a general and customary rate prevailing in the Territory and may well have been adopted by the jury.

Second. The court failed to pass upon the sufficiency of the demand, raised by the ninth assignment of errors. This court has adjudged the appellants to be liable for 291,928 shares of stock. This liability could only be converted into a money demand upon a demand for the return of the stock and a refusal to deliver. Therefore unless a legal demand be shown, and a refusal to deliver, the appellees could not seek to elect to sue for the value thereof upon the theory of a conversion. That demand was essential to sustain the appellees' right to recover as for a money demand cannot be questioned, and was conceded by the appellees. The trial Court held the document Exhibit "K" too late: this was clearly right, for even if that document could be considered a demand, the stock was then utterly worthless, and a failure to return the same was injuria absque damno. The only other demand claimed to have been made is alleged to have occurred in a conversation in the Hollenbeck

635 Hotel in Los Angeles, California. It was this oral demand that Your Honors referred to in the decision when this court

said: "The evidence tends to show that prior to the obtaining of such judgment, a demand was made upon the appellants by the appellees to be reinvested with their interest in the property."

The sufficiency of this demand was questioned by the appellants, not as a matter of fact, but as a matter of law. The appellants contended that it was not a demand upon the appellant Tevis, and further that the conversation as related by the appellees did not show a legal demand. A determination of either of these contentions in favor of the appellants must preclude the appellees' right to recover, and is therefore necessary to a proper adjudication of this case. Manifestly the court erred in failing to consider this assignment of error. (Appellants' brief, pages 76 to 81.)

Third. The Court committed manifest error in accepting the verdict of the jury as a basis from which to determine the value of the shares of stock, the value of which this court held the appellees were entitled to recover in this action. The court below instructed the jury, as a measure of damages, to find the value of the property of the corporation and deduct therefrom \$39,000 and award the appellees as damages four-sevenths of the balance, if any. This was not merely an incorrect "method of reaching" or "incorrect theory" of determining the damages, as this court held, but the rule so

adopted in this instruction is not a legal standard for determining the value of the shares of the stock in a corporation.

At most it could only be said that this "incorrect method" determined the book value of the stock, not its market value, which latter alone the appellees were entitled to recover.

The measure of damages for the conversion of the shares of stock of a corporation is its market value, not its intrinsic or book value. It is true that where a stock has no known market value then its market value must be ascertained with reference to its intrinsic value, but where evidence of the intrinsic value is permitted to be introduced it is merely received as one factor determining its market value. The market value and the intrinsic or book value are not necessarily the same. The recovery must be based upon the market value and not upon the intrinsic or book value. Examples will illustrate the statement. Quotations for the week ending March 26th, 1910, of the Chicago Stock Exchange for the stock of three banks are as follows:

	Bid.	Asked.	Book value.
Commercial National Bank.....	225	229	150
Continental National Bank.....	283	290	191
Corn Exchange Nat'l Bank.....	427	431	271

In these illustrations the measure of damages for the conversion of the stock of one of these banks would not be limited to the book value of the stock, but the market value, far in excess of the book value, would be the measure of damages. The converse is equally true:

	Bid.	Asked.	Book value.
Englewood State Bank.....	112	115	116
North Side State Bank.....	125	131	137

637 In the latter two illustrations the measure of damages would be limited to the market value, that being less than the book value. "It has been over and over again determined that in order to establish the measure of damages for the conversion of the stock of a company, proof must be offered of its market value."

Moynahan vs. Prentiss, 51 Pac. 94.

To accept in the case at bar the value of the property of the corporation as the standard for determining the value of its corporate stock, and adopt the value of the property arbitrarily as the value of the stock, is to omit the important element of the dividend earning capacity of the corporation as an element necessary for determining the value of its stock. The corporation in the case at bar at the time when the conversion of the stock took place, if at all, was possessed of undeveloped mining properties; it had an indebtedness in excess of \$39,000; the value of its shares was not tantamount proportionately to the value of its assets, but depended entirely upon the possibility of the corporation being able to raise funds with which to liquidate its indebtedness and to carry on to a successful issue the business of the corporation. The personal equation of the constituent members of the corporation, its apparent insolvency, attempted sales of stock by the appellants, and the declination of persons to purchase same, to which the appellants testified, all of these were important elements to be submitted to the jury, together with the intrinsic value of the mines as a means for determining the value of the corporate stock.

This court quoted from *Nelson vs. First National Bank*, 69 Fed. 798. "There is no better or safer criterion to determine the
638 value of the stock of an insolvent corporation than the comparison of the value of its assets with the amount of its liabilities." We respectfully submit that a reading of that case will disclose the fact that the "safe criterion" alluded to in the quotation was introduced in evidence in that case merely as one element for determining the value of the stock and not as the only criterion, as was done in the case at bar. Evidence was introduced in that case of the value of the stock independent of the value of the assets of the corporation, and it was objected that evidence of the value of the assets of the corporation was not admissible for the purpose of establishing the value of the stock. Certainly the objection was not well taken in that case, for where the stock of a corporation has no known market value—that is, if the market value cannot be determined from sales made so near to the time of the alleged conversion as to be admissible—then evidence of the assets of the corporation and its liabilities may be introduced and submitted to the jury in connection with all the other facts which may tend to enhance or depreciate the stock of the corporation, as a means of determining its value. But we respectfully submit that no case can be found wherein the value of the assets of the corporation was accepted as the sole basis for determining the value of the stock of the corporation.

It is evident that the court failed to consider this question, and

in view of the position taken by this court of the case, if the soundness of our contention as here made be still of doubt to the court, we respectfully request a re-hearing for the purpose of properly submitting to the court argument and authorities upon this question.

In conclusion we respectfully submit that notwithstanding the decision of this court that "a reading of the entire third cause of action in the complaint upon which the case was tried, makes it clear that the appellees had defined their interest in the property to be a four-sevenths interest in the capital stock of the company," a reading of the third cause of action, taken in connection with the evidence introduced at the trial, the instruction of the court, and the express avowal of the appellees, the cause of action was not one for the recovery of shares of stock in a corporation, but for the recovery of an interest in the assets of the corporation. Nowhere in the complaint is an interest in the capital stock of the corporation alluded to. No evidence was introduced to show the value of the shares of stock in the corporation. The appellees did not seek to establish the value of the stock in the corporation by evidence of the value of its assets. The evidence as to the value of the mines was not introduced for the purpose of showing the value of the stock of the corporation, but upon the theory that the appellees had a right to recover a four-sevenths interest in the mines. No attempt was made by the appellees whatever to introduce any evidence of the liabilities of the corporation. The only evidence before the court as to the liabilities was evidence of a loan from the Western Company. Whatever other liabilities of the corporation may have existed, were not in issue. If the appellees had sought to prove the value of the stock of the corporation by evidence of the value of its assets and liabilities, they should have introduced evidence of all the liabilities of the corporation, and not merely of one debt, namely,—the debt to the Western Company. The appellees not having complained of the withholding of shares of stock in the corporation, the value of said shares was not an issue before the court, and the appellants were not called upon nor prepared at the trial to give or introduce evidence as to the value of shares of stock.

And we respectfully submit that the law of the contract in this case being settled by your decision, which excludes the testimony of Jepp Ryan, T. C. Ryan, E. B. Ryan and P. B. Soto as to conversations and oral guarantees of reinvestment of the plaintiffs, and as to one of the defendants being a multi-millionaire, how can you say what effect all this testimony had upon the minds of the jury in making up their verdict, and how can you cure such an error by a remittitur of a portion of the judgment?

Wherefore, the appellants respectfully pray that a rehearing be granted of this cause, that the same may be more thoroughly considered by this court in so far as the several questions of law remain undetermined.

A. C. BAKER.
CHARLES BOWMAN.
BEN GOODRICH.

And afterwards and upon, to-wit, the 15th day of April,
641 1910, come the appellees by their attorneys and file in the
Clerk's office of said Court in said entitled cause a certain
motion for rehearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COM-
PANY, Defendants and Appellants,

vs.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees.

Motion for Rehearing.

Neale & Sutter, J. F. Kingsbury, Eugene S. Ives, Attorneys for
Appellees.

In the Supreme Court of the Territory of Arizona.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COM-
PANY, Defendants and Appellants,

vs.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees.

Motion for Rehearing.

Now come the appellees and move for a rehearing upon the fol-
lowing grounds:

I. That the contractual obligation of the appellants was not only
to reinvest the appellees with the interest which they had at the
time of the execution of the contract, but also to turn over to ap-
pellees the management of the corporation, and therefore under
the reasoning of the opinion of this court, the judgment of the Dis-
trict Court should have been affirmed.

II. Even though the destruction of the value of the 279,500
shares of stock was not the proximate result of a breach of contract,
nevertheless under the pleadings and evidence the appellees could
recover damages therefor in this action.

642 III. In any event this court in the furtherance of justice should
directly modify the judgment of the District Court, and af-
firm the judgment as so modified to the end that appellees
may not be deprived of the right to a cross-appeal.

I. This court in its decision proceeded upon the theory that the
contractual obligation of the appellants was simply to reinvest ap-
pellees with the interest which they had at the time of the execution
of the contract; and as a corollary to such interpretation of the
contract, the court held that appellees could not in this action re-

cover the value of the 279,500 shares of stock which became of no value under the appellants' management of the corporation.

The court said: "There is no duty upon the part of the appellants to restore to the appellees the management and control of the corporation except in so far as a right to management and control would flow from a restoration to them of a majority of the capital stock."

With this premise, the court further on concluded: "The proximate damage resulting from a breach of this contract was the loss of the value of the stock to be returned. This was contemplated by the contract and the appellants should answer therefor. The loss of the value of the 279,500 shares of stock was a remote and indirect result of the breach and not such as the appellants must have had in contemplation at the time of the execution of the contract as the probable result of such breach."

With this reasoning of the court we do not take issue; but we respectfully submit that the court, probably through inadvertence, erred in its premise that there was no contractual obligation
643 on the part of the appellees to restore to the appellants the management of the corporation.

It is recited in the contract, that the appellants were desirous "to obtain the full management of the affairs of the said corporation."

The appellees thereupon agreed "that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire."

Then follows the clause of the contract upon whose breach this action was brought, as follows: "The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract; should they fail or refuse to comply with the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of parties of the first part to do any and all things herein required of them, then the interests of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

It is our respectful contention that in arriving at its interpretation of this paragraph of the contract, the Court dwelt exclusively upon its concluding clause and did not give due attention to the preceding words: "Should they fail or refuse to comply with the
644 agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect; otherwise to remain in full force and effect."

As was well said in the opinion of the court, the contract must be considered as an entirety. The words "shall become null and void and of no effect" must be given a definite meaning. It is our contention that the intention of the parties as gathered from these

words was that in the event of the failure of appellants' financial scheme, the status quo as it existed at the time of the execution of the contract, should be re-established.

If these words, "then the agreement shall become null and void and of no effect" had been omitted from the contract, then the reasoning of this court upon this point would, in our minds, be impelling, and, as suggested by the court, the remedy of appellees would not be in an action for breach of contract. We respectfully urge the court to put itself in the place of the parties to the contract.

The Ryans had control and had the officers and the management. Tevis and McKittrick wanted it. Tevis and McKittrick were endeavoring to induce the Ryans to change the conditions as they then existed, and to permit the appellants to undertake to finance the corporation. The Ryans were loath to do this. Finally, in a qualified way, they acceded, and the minds of the parties met. It appears to us manifest from the instrument itself, howsoever clumsily drawn, that the attitude of the Ryans was this: We will turn over to

645 you the management and will give you two years' time to carry out your plan; but if you fail, it shall be as if we had done nothing; as if a contract had never been made; we only make this contract because we hope that you will within two years do these things which you are going to try to do. If, however, you fail, you must do that which will as near as possible make it as if the contract had never been made.

The obligations of the Ryans under the contract were to be fulfilled immediately. They were to abandon the management and to resign as officers, and to give up their majority of the stockholdings. The things which Tevis and McKittrick were to do were necessarily things which could only be done after the Ryans had turned over to them the management and the stock; and the agreement by Tevis and McKittrick was that if they should fail within the stipulated time, then the contract should be null and void and of no effect. To us these words spell with clearness an obligation on their part to undo everything which the Ryans had done in fulfillment of the contract; in other words it was their duty at the end of the two years not only to reinvest the Ryans with a four-sevenths interest, but also to resign as officers, and to restore the Ryans to the management of the corporation.

This contention was perhaps not sufficiently presented in appellees' brief. It appears by a re-reading of it that counsel assumed but did not argue that such was the proper meaning of the contract. If this court should upon reconsideration come to the conclusion that the obligation of appellees under the contract was to restore the management to the appellees at the expiration
646 of the two years, then we submit that under the authorities and reasoning on pages 33 and 34 and 44 to 49 of appellees' brief, the judgment should be affirmed.

II. In its opinion this court said: "We do not hold nor is it to be implied that the appellees have no remedy for such loss, but such remedy is not to be found in the case now before us."

The facts alleged in the complaint and the evidence would be sufficient to constitute an action for damages for the destruction of

the value of 279,500 shares of stock issued to the Ryans shortly after the execution of the contract. The appellees did not demur to the complaint on the ground of improper joinder of causes of action or make any motion to strike any material allegation thereof: therefore proceeding upon the assumption as suggested in the opinion of the court that the appellees had a remedy for such loss, judgment under the instructions of the District Court was proper.

III. The appellees have determined to elect to file a remittitur in this court in the amount of \$64,564.63 and thus avert a new trial and will have done so before this court will convene to consider this motion.

The effect of filing such remittitur will be to preclude appellees from asking the United States Supreme Court to review that portion of the judgment which ran against them; in the meantime the appellants have the right to appeal. It seems to us no more than justice that the appellees should have the same right as the appellants.

Despite the fact that the appellees shall have filed the remittitur, this court will, unless perhaps appellants shall have paid the judgment as remitted, retain jurisdiction over the entire matter. We, therefore, ask that this court, in the event that it should be impressed with our views now submitted, should in any order it may make include an order relieving the appellees from the effect of the remittitur as filed, or permitting its withdrawal or cancellation.

All of which is respectfully submitted.

Dated Tucson, Arizona, April 15th, 1910.

NEALE & SUTTER,

J. F. KINGSBURY,

EUGENE S. IVES,

Attorneys for Appellees.

648 And on to-wit: the nineteenth day of April, 1910, came the appellees by their attorneys and filed in the clerk's office of said court in said entitled cause their certain Remittitur and Release, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COMPANY, Defendants and Appellants,

vs.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees.

Whereas, heretofore a judgment has been rendered in favor of the above named plaintiffs and appellees, and against the above named defendants and appellants in the District Court of the Third Judicial District of the Territory of Arizona, in and for the county of Maricopa, for the sum of One hundred and thirty-two thousand dollars; and

Whereas, the said defendants and appellants did appeal from the said judgment to this, the Supreme Court of the Territory of Arizona; and

Whereas, the said Supreme Court did on the second day of April, 1910, after hearing, order and adjudge that should the appellees elect to file a remittitur in this court within twenty days thereafter, in the sum of Sixty-four thousand five hundred and sixty-four dollars and sixty-three cents (\$64,564.63) judgment should be
649 entered in favor of the appellees and against the appellants and the sureties upon the bond on appeal, and against the Pacific Surety Company, surety upon the bond given in the court below in the sum of Sixty-seven thousand four hundred and thirty-five dollars and thirty five cents (\$67,435.35).

Now, therefore, we, Jepp Ryan, T. C. Ryan and E. B. Ryan, the above named plaintiffs and appellees, do hereby in pursuance of such judgment and order of this court, remit and release the above named defendants and appellants from Sixty-four thousand five hundred and sixty-four dollars and sixty-three cents (\$64,564.63) of the said judgment of the district court.

In witness whereof, the said plaintiffs and appellees by their attorneys of record have hereunto signed this remittitur and release on this the eighteenth day of April, 1910.

NEALE & SUTTER,
J. T. KINGSBURY,
EUGENE S. IVES,

Attorneys for Appellees & Plaintiffs.

Attested at the city of Phoenix, this 19th day of April, 1910.

[SEAL.]

F. A. TRITLE, JR., *Clerk.*

And on to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in
650 said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellants, be submitted.

And on the same day to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion for Rehearing filed herein by appellees, be submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the

following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellants and heretofore submitted, be, and the same is hereby granted, and the cause set for hearing
651 November 10th, 1910.

And on the same day, to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellees and heretofore submitted, be, and the same is hereby granted, and the cause set for hearing November 10th, 1910.

And on to-wit, the tenth day of November, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause coming on at this time for re-hearing, was argued by Mr. E. S. Ives for appellees, and argument continued until tomorrow morning.

652 And on to-wit: the eleventh day of November, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

This cause having been continued from yesterday, and coming on now for hearing, Mr. E. S. Ives concluded his argument for appellees, Mr. Ben Goodrich argued for appellants, and cause ordered submitted.

And on the same day, to-wit: the eleventh day of November, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, on motion of Mr. E. S. Ives, attorney for appellees herein, it is ordered that he be granted fifteen days within which to file additional brief, and

On motion of Mr. Ben Goodrich, attorney for appellants herein, it is ordered that he be granted fifteen days thereafter within which to file an additional brief.

653 And on to-wit: the twenty-fifth day of March, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Opinion on re-hearing, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS et al., Appellants,
vs.
JEP RYAN et al., Defendants.

Appeal from the Judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

Edward Kent, Judge.

On Rehearing.

Ben Goodrich, A. C. Baker and Charles Bowman for appellants.
Eugene S. Ives, Neale & Sutter and J. T. Kingsbury, for appellees.

Per Curiam:

This rehearing was had primarily for the purpose of enabling counsel to present their views as to the propriety of the action of this court in affirming the judgment of the trial court on condition that the appellees elect to file a remittitur, otherwise ordering a reversal and a new trial, the question not having been presented by counsel prior to the rendition of such judgment.

654 After a consideration of the argument had and briefs filed we adhere to the views expressed in our former opinion reported in the 108 Pacific Reporter, 461.

It is therefore ordered that should the appellees elect to file a remittitur in this court within 20 days hereafter in the amount of \$64,564.63, judgment shall be entered in this court in favor of the appellees and against the appellants and the sureties upon the bond on appeal and against the Pacific Surety Company, surety upon the bond given in the court below, in the sum of \$67,435.39 with costs in the trial court and that the costs of this appeal be awarded to the

appellants, otherwise that the judgment be reversed and the cause remanded for a new trial.

JOHN H. CAMPBELL,
Associate Justice.

ERNEST W. LEWIS,
Associate Justice.

EDWARD M. DOE,
Associate Justice.

The Chief Justice and Mr. Justice Doan not sitting.

655 And on the same day, to-wit: the twenty-fifth day of March, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

W. S. TEVIS and W. H. MCKITTRICK, Appellants,
vs.
JEPP RYAN, T. C. RYAN, and E. B. RYAN, Appellees.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that should the appellees elect to file a remittitur in this court within twenty days hereafter in the amount of sixty-four thousand five hundred sixty-four and 63/100 (\$34,564.63) dollars, judgment shall be entered in this court in favor of the appellees and against the appellants and United Surety Company, surety on the Supersedeas Bond on appeal and against the Pacific Surety Company, surety upon the bond given in the court below in the sum of sixty-seven thousand four hundred thirty-five and 39/100 (\$67,435.39) dollars, with costs in the trial court, and that the costs of this appeal be awarded to the appellants, otherwise that the judgment of the lower court be reversed and the cause remanded for a new trial.

656 It is further ordered, adjudged and decreed that the appellants herein do have and recover of and from Jepp Ryan, T. C. Ryan and E. B. Ryan, appellees herein, their costs in this court, taxed at three hundred fifty-three and 70/100 (\$353.70) dollars.

And on to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, comes A. C. Baker, Esq., for appellants herein, in open court, and given notice of appeal to the Supreme Court of the

United States, from the judgment of this court, and moves that the Mandate be stayed for sixty-days.

Whereupon, the Court ordered that said motion be taken under consideration.

And on the same day, to-wit: the twenty-seventh day of March, 1911, being one of the regular juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

657

Title of Cause.

Comes now Samuel L. Pattee on behalf of counsel for the appellees, and in open court the appellees, by their counsel remit from the judgment of the trial court the sum of sixty-four thousand five hundred sixty-four and 63/100 (\$64,564.63) dollars, and release and remit the above named defendants and appellants from so much of said judgment, and consent that judgment be entered in this court in favor of the appellees and against the appellants and the sureties upon their appeal bond and against the Pacific Surety Company, surety on the bond given in the court below, for the sum of sixty-seven thousand four hundred thirty-five and 39/100 (\$67,435.39) dollars, in pursuance of the opinion and order of this court made on the 25th day of March, 1911.

And on the same day, to-wit: the twenty-seventh day of March, 1911, being one of the regular, juridical days of the January term of said court, 1911, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day it is ordered that the motion of attorney for appellants heretofore submitted, that Mandate be stayed sixty days, be and the same is hereby granted.

658

And afterwards and upon, to-wit, the 28th day of March, 1911, come the appellees by their attorneys and file in the clerk's office of said court in said entitled cause a certain remittitur, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1124.

W. S. TEVIS, W. H. MCKITTRICK, and THE PACIFIC SURETY COMPANY, Defendants and Appellants,

vs.

JEPPI RYAN, T. C. RYAN, and E. B. RYAN, Plaintiffs and Appellees.

Whereas, heretofore a judgment has been rendered in favor of the abovenamed plaintiff and appellees, and against the abovenamed de-

defendants and appellants in the District Court of the Third Judicial District of the Territory of Arizona; in and for the county of Maricopa, for the sum of one hundred and thirty-two thousand dollars; and

Whereas, the said defendants and appellants did appeal from the said judgment to this, the Supreme Court of the Territory of Arizona; and

Whereas, the said Supreme Court, did on the 25th day of March, 1911, after hearing, order and adjudge that should the appellees elect to file a remittitur in this court within twenty days thereafter, in the sum of sixty-four thousand five hundred and sixty-four dollars and sixty-three cents (\$64,564.63) judgment should be entered in favor of the appellees and against the appellants and the sureties upon the bond on appeal and against the Pacific Surety Company, surety upon the bond given in the court below in the sum of sixty-seven thousand four hundred and thirty-five dollars and thirty-five cents (\$67,435.35),

Now, therefore, We, Jeppi Ryan, T. C. Ryan and E. B. Ryan, the abovenamed plaintiffs and appellees, do hereby in pursuance of such judgment and order of this court, remit and release the abovenamed defendants and appellants from Sixty-four thousand five hundred and sixty-four dollars and sixty-three cents (\$64,564.63) of the said judgment of the district court.

In witness whereof, the said plaintiffs and appellees by their attorneys of record have hereunto signed this remittitur and release on this the 27th day of March, 1911.

EUGENE S. IVES,
NEALE & SUTTER,
J. F. KINGSBURY.

Attest at the city of Phoenix this 27th day of March, 1911.

F. A. TRITTE, Jr., *Clerk*.

And on to-wit: the ninth day of November, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

Appellees herein, by their attorneys, having filed a remittitur in this court in the sum of Sixty-four Thousand Five Hundred and Sixty-four Dollars and Sixty-three cents, (\$64,564.63), comes now Ben Goodrich, Esq., attorney for appellants herein, and moves the Court that final judgment be entered in this cause in accordance with the order made and entered heretofore on the 25th day of March, 1911.

Whereupon the Court took said motion under advisement.

And on to-wit: the tenth day of November, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion that final judgment be entered in this cause, be and the same is hereby granted.

661 And on the same day to-wit: the tenth day of November, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order and judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1124.

W. S. TEVIS, W. H. McKITTRICK, and THE PACIFIC SURETY COMPANY, Appellants,

vs.

JEPP RYAN, T. C. RYAN, and E. B. RYAN, Appellees.

This Court, in the above entitled action, having heretofore, to-wit: on the 25th day of March, 1911, made and entered an order that the appellees should have a judgment in this court in their favor and against the appellants and their sureties in the sum of \$67,435.39, with costs in the trial court, conditioned, however, that the appellees should within 20 days from the date of said order file a remittitur of the judgment of the lower court in this court in the sum of \$64,564.63, otherwise the judgment of the lower court should be reversed; and that appellants should recover their costs in this court expended; and it appearing to the satisfaction of this Court that the appellees heretofore, to-wit: on the 28th day of March, 1911, filed in this court a remittitur in writing of the judgment of the lower court in the sum of \$64,564.63 pursuant to said order, and that the appellees are now entitled to a judgment as specified and
662 stated in said order:

Now, Therefore, it is ordered, adjudged and decreed that the appellees Jepp Ryan, T. C. Ryan and E. B. Ryan, do have and recover of and from the appellants, W. S. Tevis and W. H. McKittrick, and United States Surety Company, a corporation, surety upon the supersedeas bond on appeal, and the Pacific Surety Company, a corporation, surety upon the bond given in the court below, the sum of Sixty-seven Thousand Four Hundred Thirty-five and 39/100 (\$67,435.39) Dollars, with costs of the trial court:

It is furthermore ordered and adjudged that the appellants, W. S. Tevis and W. H. McKittrick, have and recover their costs in this court against the appellees, Jepp Ryan, T. C. Ryan and E. B. Ryan, taxed at three hundred eighty-two and 20/100 (\$382.20) dollars.

663 And afterwards and upon, to-wit, the 3rd day of January, 1912, came the appellants, by their attorneys, and filed in the Clerk's office in said court, a certain Petition for Writ of error in the words and figures following, to-wit:

(Title Court and Cause.)

Petition for Writ of Error.

Comes now William S. Tevis, William H. McKittrick, The United Surety Company, a corporation, and The Pacific Surety Company, a Corporation, Appellants above named, and respectfully show, that the above entitled cause is now pending in the Supreme Court of the Territory of Arizona, and that a judgment therein has been rendered on the 10th day of November, 1911, for the sum of Sixty-seven Thousand Four Hundred and Thirty-five and 39/100 (\$67,435.39) dollars, with costs of the trial court, in favor of the appellees and against the appellants; and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error:

Wherefore, said William S. Tevis, William H. McKittrick, The United Surety Company, a corporation, and The Pacific Surety Company, a corporation, pray that a writ of error may issue out of the Supreme Court of the United States to the Supreme Court of the Territory of Arizona, and that the Clerk of the Supreme Court of the Territory of Arizona be directed to send the record and proceedings of said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors, herewith filed, by said
664 appellants, may be reviewed and if error be found, corrected according to the laws and customs of the United States.

Dated at Phoenix, Arizona, this 3rd day of January, A. D. 1912.

A. C. BAKER,
CHARLES BOWMAN,
BEN GOODRICH,

Attorneys for Appellants.

Allowed this the 3rd day of January, 1912, by

EDWARD KENT,

*Chief Justice of the Supreme Court of the
Territory of Arizona.*

And on the same day, to-wit, on the 3rd day of January, 1912, came the appellants, by their attorneys, and filed in the Clerk's office of said Court, in said entitled cause, a certain Assignment of Errors, in the words and figures following, to-wit:

(Title Court and Cause.)

Assignment of Errors.

Come now the above named appellants, William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and the Pacific Surety Company, a Corporation, and show that in the record, proceedings, decision, and final judgment herein there is manifest error, and that the Supreme Court of the Territory of Arizona erred in this, to-wit:

First.

In sustaining the ruling of the trial court in overruling the appellants' objection to the admission of oral evidence to vary, contradict, alter, and add to the written contract set up in the appellees' complaint, and erred in overruling the appellants' objection to all 665 evidence of the prior and contemporaneous declarations, statements, and negotiations of the parties to said contract. The substance of said oral evidence being as follows:

1. The witness, Jepp Ryan, testified to the making of a tentative draft of an agreement prior to the making of the contract sued on in this case; and that the appellant, McKittrick, stated to the witness that Mr. Tevis was a multi-millionaire and rich and influential, and by putting him in control of the property of the Turquoise Company he would try to handle it so that each of the appellees would get their money back; and that appellants McKittrick stated to the witness that if the appellants did not sell the stock they would return the property to the appellees the same as it was at the time of the making of the contract, and that he, the witness, stated to the appellant, McKittrick, that the contract to be entered into, and sued on in this action, was not definite enough and that the appellant, McKittrick, replied that they, the appellants, wanted to do what was fair between all, and that the witness replied that if it was a question of honor, they, the appellees, would let it go.

2. The witness, Thomas C. Ryan, testified to the drafting of a tentative agreement which the appellant, McKittrick, refused to sign, which tentative agreement was so arranged that all the parties could get their money out of the property. That with respect to the contract sued on in this action, the appellee, Jepp Ryan, has stated to the appellant, McKittrick, that he did not like the looks of that contract that it was not plain to him; and that the appellant, McKittrick, replied to the objection, that it was all right, that the 665 appellants would see that the appellees got their money back whether the appellants came up with this contract or not. That the appellees would get their money back at the end of the time specified in the contract whether the appellants sold the stock specified in the contract or not; and that the appellees replied thereto that if that was the way, he, the appellant, McKittrick, said it was, that they, the appellees, would sign it; and that he, the appellant, McKittrick, stated that Tevis was a very rich man and if they, the appellants, could not sell the stock, they would see that the appellees got their interest back and that upon these statements of the appellants, the appellees signed the contract sued on in this action.

3. The witness, E. B. Ryan, testified that they talked over the contract sued on in this action, and that Jepp Ryan told the appellant, McKittrick, that he did not like the looks of that contract, and that the appellant, McKittrick, thereupon stated that they, the appellants, intended to be fair with everybody, and that if they, the appellants, did not fulfill their part of the contract, they would return the appellees' interest to them at the end of two years, the same as it was at the time of entering into the contract. That he

appellant, McKittrick, had stated to the appellees that the appellant Tevis, was a very rich man, a multi-millionaire, and would not have anything to do with any property unless they, the appellants, had absolute control, and that if they had absolute control, they then would take hold of the proposition and try and handle it so that every one would get their money; that that was the understanding before the contract sued on in this action was signed.

667 4. The witness, P. B. Soto, testified that the appellees made some objection to the contract sued on in this action about giving up the control of the property to the appellant Tevis, and that the appellant, McKittrick, replied that Mr. Tevis was a very responsible man and a very rich man, and would not have anything to do with the property except he had full control. That if the treasury stock was not sold within two years, the appellees would be reinstated and placed back in the same position that they were before signing the contract.

Second.

In sustaining the ruling of the trial court overruling the objections of the appellants to the admission of immaterial and irrelevant evidence. The rulings of the trial court, particularly complained of, being the following:

1. Permitting the witness, E. B. Ryan, to testify that the first time he heard about the suit of the Western Company against the Turquoise Company having been brought in Cochise County, Arizona, was through Jepp Ryan.

2. Permitting the witness, Thomas C. Ryan, to testify that he never received any notice of the suit brought by the Western Company against The Turquoise Copper Mining & Smelting Company, in Kern County, California, and that he never received any notice of the suit brought by the Western Company against the Turquoise Company, in Cochise County, Arizona.

3. Permitting the witness, Charles M. Reynaud, to testify that he had been conducting his business in behalf of these properties for the past two years with the appellant, McKittrick, and that the appellant, McKittrick, had told him that he was the owner of the Tejon Mining Company.

668 4. Permitting the document marked Exhibit "K" to be introduced in evidence, together with the recitals and self-serving declarations in said document, marked "Exhibit K", contained.

Third.

In sustaining the ruling of the Trial Court, denying the motion made by the appellants at the close of the appellees' case, that the Court instruct the jury to return a verdict for appellants.

Fourth.

In refusing to sustain the Fifth Assignment of Error presented by the appellants to the Supreme Court of the Territory of Arizona, and urged by the appellants, as follows:

"Fifth. The Court erred in instructing the jury as follows: "You are instructed that if you find that the plaintiffs are entitled to damages under the evidence and instructions of the Court, in ascertaining the amount of such damages, you shall ascertain the value of the property at the time that the plaintiffs demanded that the defendants re-invest them with their interest therein. -You should deduct therefrom the amount of the claim of the Western Company with interest, to-wit, \$39,000, and then award the plaintiffs four-sevenths of the balance remaining."

Fifth.

669 In refusing to sustain the Eleventh Assignment of Error presented by the appellants to the Supreme Court of the Territory of Arizona, and urged by the appellants and made on the ground that the Trial Court erred in denying the motion for new trial made by the appellants on the ground that the Trial Court erred in instructing the jury as follows:

"You are instructed that if you find that the plaintiffs are entitled to damages under the evidence and instructions of the Court, in ascertaining the amount of such damages, you shall ascertain the value of the property at the time that the plaintiffs demanded that the defendants reinvest them with their interest therein. You should deduct therefrom the amount of the claim of the Western Company with interest, to-wit, \$39,000, and then award the plaintiffs four-sevenths of the balance remaining."

Sixth.

In refusing to sustain the Ninth Assignment of Error presented by the appellants to the Supreme Court of the Territory of Arizona, and urged by the appellants as follows:

"Ninth. The evidence is insufficient to support either the verdict or the judgment, and they are both contrary to the evidence and contrary to the law as applicable to the facts disclosed by the evidence and the pleadings, for the following reasons:

"1. No demand has been shown to have been made upon the appellant, Tevis, and no good or sufficient demand upon the appellant McKittrick.

"2. The appellees sought to recover damages for a four-sevenths interest in the property of the corporation and no evidence was introduced tending to support such recovery.

670 "3. The evidence showed that the appellees had no interest in the property of the corporation subject to suit.

"There was no competent evidence tending to establish a contract other than for the redelivery of shares of stock."

Seventh.

In refusing to sustain the Thirteenth Assignment of Error presented to the Supreme Court of the Territory of Arizona, and urged by the appellants, as follows:

"Thirteenth. The Court erred in denying appellants' motion for a new trial, made on the grounds that the evidence is insufficient to sustain either the verdict or the judgment, and that the same are against the evidence, for the reasons:

"The appellees sought to recover damages for a four-sevenths' interest in the property of the corporation and no evidence was introduced tending to support such recovery.

"The evidence showed that the appellees had no interest in the property of the corporation subject to suit.

"There was no competent evidence tending to establish a contract other than for the delivery of shares of stock.

Eighth.

In refusing to sustain the Fifteenth Assignment of Error presented to the Supreme Court of the Territory of Arizona, and urged by the appellants, as follows:

"Fifteenth. The Court erred in denying appellants' motion for a new trial, made on the grounds that the Court erred in denying the defendants' motion that the jury be instructed to return a verdict for the defendants.

671

Ninth.

The Supreme Court of the Territory of Arizona erred in holding that the appellees were entitled to recover in this action the value of four-sevenths of the stock of the Turquoise Copper Mining and Smelting Company, less 279,500 shares retained by the appellees, namely, the value of 291,928 shares.

Tenth.

The Supreme Court of the Territory of Arizona erred in holding that upon the appellees' complaint they are entitled to recover in this action the value of shares of stock of the Turquoise Copper Mining and Smelting Company.

Eleventh.

The Supreme Court of the Territory of Arizona erred in holding that the verdict of the jury returned in this action, afforded a basis for the computation of the value of 291,928 shares of stock of the Turquoise Copper Mining and Smelting Company.

Twelfth.

The Supreme Court of the Territory of Arizona erred in holding that the verdict of the jury, as returned by them, correctly found and fixed the value of four-sevenths of the shares of the Capital stock of the Turquoise Copper Mining and Smelting Company.

Thirteenth.

The Supreme Court of the Territory of Arizona erred in finding and holding that the evidence tends to show that, prior to the ob-

672 taining of the judgment in Kern County, California, by the Western Company against the Turquoise Company, upon the promissory notes of the corporation, the appellees made demand upon the appellants to be reinvested with their interests in the property, and that such demand was ignored by the appellants.

Fourteenth.

The Supreme Court of the Territory of Arizona erred in computing the value of 291,928 shares of stock of the Turquoise Copper Mining and Smelting Company at \$67,435.37.

Fifteenth.

The Supreme Court of the Territory of Arizona erred in entering judgment in the Supreme Court of the Territory of Arizona against the appellants, for \$67,435.37.

Wherefore, and on account of said errors and each of them, all of which appear upon the record of said cause and in the decision and judgment of said Supreme Court of the Territory of Arizona, said W. S. Tevis, W. H. McKittrick, The United States Surety Company and The Pacific Surety Company, pray that the judgment of the said Supreme Court of the Territory of Arizona, in this cause may be reversed, and that the said Supreme Court of the Territory of Arizona be ordered to enter an order reversing the judgment of the Trial Court in said cause.

Dated, Phoenix, Arizona, January 3rd, 1912.

A. C. BAKER,
CHARLES BOWMAN,
BEN GOODRICH,

Attorneys for Appellants.

673 And on the same day, to-wit, the 3rd day of January, 1912, came the appellants, by their attorneys, and filed in the Clerk's office of said Court, in said entitled cause, a certain order for writ of error, in words and figures following, to-wit:

(Title Court and Cause.)

Order for Writ of Error.

On this 3rd day of January, 1912, came the above named Appellants, by their attorneys, and filed herein and presented to the court their petition praying for the allowance of a Writ of Error, intended to be urged by them, together with the assignments of error, praying also that the transcript of record and proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and praying that such other and further proceedings may be had as may be proper in the premises; on consideration whereof said writ of error is allowed, upon said Appellants giving

bond according to law, in the sum of Eighty-Five Thousand Dollars, which shall operate as a supersedeas bond;

And it is further ordered that said petition be and the same is hereby allowed and granted and that said writ of error be allowed in said cause, returnable before the United States Supreme Court on the 3rd day of March, 1912, and that the Clerk of this court sign and seal the writ and that a transcript of the record of all proceedings and papers in said cause shall be made and transmitted to the said United States Supreme Court.

It is further ordered that the undertaking in the sum of
674 Eighty-Five Thousand Dollars, tendered by the said Appellants, be and the same is hereby approved as the undertaking on the Writ of Error herein.

Dated at Phoenix, Arizona, this 3rd day of January, 1912.

EDWARD KENT,

*Chief Justice of the Supreme Court
of the Territory of Arizona.*

And on the same day, to-wit, the 3rd day of January, 1912, came the appellants, by their attorneys, and filed in the Clerk's office of said Court, in said entitled cause, a certain Supersedeas Bond, in words and figures following, to-wit:

In the Supreme Court of the United States.

WILLIAM S. TEVIS, WILLIAM H. MCKITTRICK, THE UNITED SURETY COMPANY, a Corporation, and THE PACIFIC SURETY COMPANY, a Corporation, Plaintiffs in Error,

vs.

JEPP RYAN, THOMAS C. RYAN, and E. B. RYAN, Defendants in Error.

Supersedeas Bond.

Know all men by these presents: That we, William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a corporation, as principals, and Fidelity and Deposit Company of Maryland, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto Jepp Ryan, Thomas C. Ryan and E. B. Ryan in the sum of Eighty Five Thousand Dollars, to be paid to the said Jepp Ryan, Thomas C. Ryan and E. B. Ryan, their executors, or administrators or assigns,
to which payment, well and truly to be made, we bind our-
675 selves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Scaled with our seals and dated the 28th day of December, 1911.

Whereas in a suit pending in the Supreme Court of the Territory of Arizona between William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a corporation, the above named plaintiffs in error, and

Jepp Ryan, Thomas C. Ryan and E. B. Ryan, the above named defendants in error, judgment was rendered against the said William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a corporation, on the 10th day of November, 1911, for the sum of Sixty-seven thousand and Four Hundred and Thirty-five and 39/100 (\$67,435.39) dollars with costs of the Trial Court; and said William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a Corporation, having obtained a writ of error and filed a copy thereof in the office of the Clerk of the said Supreme Court of the Territory of Arizona to reverse the judgment in said suit, together with a citation directed to said Jepp Ryan, Thomas C. Ryan and E. B. Ryan, citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia;

Now therefore if the said William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a Corporation shall prosecute their
676 said writ of error to effect and answer all costs and damages if they shall fail to make their said plea good then the above obligation to be void, otherwise to remain in full force and effect.

In witness whereof, said William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a Corporation, have hereunto set their hands and seals, and the said Fidelity and Deposit Company of Maryland has caused its corporate name to be signed and its corporate seal to be affixed by its duly authorized agent, this 28th December, 1911.

WILLIAM S. TEVIS, [SEAL.]
WILLIAM H. MCKITTRICK, [SEAL.]
THE UNITED SURETY COMPANY,

A Corporation,
By ISAAC FROHMAN, [SEAL.]
Its Attorney in Fact;

THE PACIFIC SURETY COMPANY,
A Corporation,

By C. E. LINAKER, *Secretary;* [SEAL.]
W. A. CHOWEN, *Vice President,*

Principals,
FIDELITY AND DEPOSIT COMPANY OF
MARYLAND.

By GUY LEROY STEVICK,
Attorney in Fact, [SEAL.]
By JAMES W. MOYLES, *Agent,*

Surety.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 28th day of December in the year 1911 before me, a Notary Public, in and for said San Francisco County, residing therein and duly commissioned and sworn, appeared W. A. Chowen,

known to me to be the Vice President and C. E. Linaker,
 677 known to me to be the Secretary of the Pacific Surety Com-
 pany, the corporation that executed the within instrument,
 and acknowledged to me that such corporation executed the same;
 and that they subscribed the name of Pacific Surety Company thereto
 as Principal and each his own name as Vice President and Secre-
 tary respectively.

[SEAL.]

NETTIE HAMILTON,

*Notary Public in and for the said City and County of
 San Francisco, State of California.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 30th day of December, A. D. 1911, before the subscriber,
 a Notary Public of the State of California, in and for the City &
 County of San Francisco duly commissioned and qualified, came
 Guy LeRoy Stevick, Attorney in fact and James W. Moyles, agent
 of the Fidelity and Deposit Company of Maryland to me personally
 known to be the individuals and officers described in, and who exe-
 cuted, the preceding instrument, and they each acknowledged the
 execution of the same, and being by me duly sworn, severally and
 each for himself depose and saith: That they are the said officers
 of the Company aforesaid, and the seal affixed to the preceding in-
 strument is the corporate seal of said Company, and that the said
 Corporate Seal and their signatures as such officers were duly affixed
 and subscribed to the said instrument by the authority and direction
 of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed
 my official seal, at the city of San Francisco the day and
 678 year first above written.

HORTENSE GARDNER, [SEAL.]

*Notary Public in and for the City and County of
 San Francisco, State of California.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, H. L. Mulerevy, County Clerk of the City and County of San
 Francisco, and ex-officio Clerk of the Superior Court thereof, the
 same being a Court of Record, having by law a seal, do hereby cer-
 tify, That Hortense Gardner whose name is subscribed to the Cer-
 tificate of the proof of acknowledgment of the annexed instrument
 and thereon written, was, at the time of taking such proof and
 acknowledgment, a Notary Public, in and for said City and County,
 residing therein, duly commissioned and sworn, and duly authorized
 by the laws of said State to take the acknowledgments and proofs
 of deeds or conveyances, for land, tenements or hereditaments in
 said State, to be recorded therein. And further that I am well
 acquainted with the handwriting of such Notary Public, and verily
 believe that the signature to said Certificate of proof or acknowledg-

ment is genuine, and that said instrument is executed and acknowledged according to the laws of said State.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, the 30th day of December, 1911.

[SEAL.]

H. I. MULCREVY, *Clerk*.

679 STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court thereof, the same being a Court of Record, having by law a seal, do hereby certify, That Nettie Hamilton whose name is subscribed to the Certificate of the proof of acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof and acknowledgment, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, and duly authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances, for land, tenements or hereditaments in said State to be recorded therein. And further that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of said state.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, the 30th day of December, 1911.

[SEAL.]

H. I. MULCREVY, *Clerk*.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this thirtieth — in the year One Thousand Nine Hundred and Eleven, before me, Nettie Hamilton, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared William S. Tevis and William H. McKittrick, known to me to be the persons described in, whose
680 names are subscribed to and who executed the annexed instrument, and they duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in said city and county aforesaid, the day and year last above written.

[SEAL.]

NETTIE HAMILTON,

*Notary Public in and for the City and County of
San Francisco, State of California.*

My commission expires March 24th, 1913.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 30th day of December in the year One Thousand Nine Hundred and Eleven, before me, Hortense Gardner a Notary Public

in and for said city, county and state, residing therein, duly commissioned and sworn, personally appeared Isaac Frohman known to me to be the attorney in fact of the United Surety Company, one of the corporations that executed the within and foregoing instrument, and acknowledged to me that such corporation executed the same, and that he subscribed the name of the United Surety Company thereto as Principal and his own name as Its Attorney in Fact respectively.

[SEAL.]

HORTENSE GARDNER,

*Notary Public in and for the said City and County of
San Francisco, State of California.*

My commission expires August 23, 1915.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 30th day of December, in the year One Thousand
681 Nine Hundred and eleven before me, Hortense Gardner, a

Notary Public in and for the said City and County, residing therein, duly commissioned and sworn, personally appeared Isaac Frohman known to me to be the person whose name is subscribed to the within instrument, as the Attorney in fact of United Surety Company and the said Isaac Frohman duly acknowledged to me that he subscribed the name and affixed the corporate seal of United Surety Company thereto as principal, and his own name as its Attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[SEAL.]

HORTENSE GARDNER,

*Notary Public in and for the City and County of
San Francisco, State of California.*

Power of Attorney.

Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, by John H. Wight, its Vice President, and Edgar F. Dobson, its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 6th day of July, 1898, a copy of which is hereto attached, does hereby nominate, constitute and appoint Guy LeRoy Stevie, James W. Moyles, Paul M. Nippert, L. A. Redman and Lewis Alexander, all of the City of San Francisco, State of California, its true and lawful agents and attorneys in fact, to make, execute, *sac* and deliver for and
682 on its behalf as surety, and as its act and deed, all bonds or undertakings. Such bonds or undertakings to be executed

for the Company by any two of said Guy LeRoy Stevick, James W. Moyles, Paul M. Nippert, L. A. Redman and Jewel Alexander, one signing, as attorney in fact, and the other attesting, as agent, and affixing the seal of the Company. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons. This power of attorney revokes those issued August 3rd, 1910, in behalf of Guy LeRoy Stevick et al.

In witness whereof, the said John H. Wight, Vice-President, and Edgar F. Dodson, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland this 31st day of January, A. D., 1911.

[SEAL.]

EDGAR F. DODSON,

Assistant Secretary.

JOHN H. WIGHT,

Vice-President.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 6th day of July, 1898, the following resolution was unanimously adopted, to-wit:

"Whereas, It frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have
683 executed by the regularly elected officers of the Company;

"Therefore be it resolved, That the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

We, John H. Wight, Vice-President, and Edgar F. Dodson, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy taken from the Records of Proceedings of the Board of Directors of the Fidelity and Deposit Company of Maryland, and is still in force.

In testimony whereof, We have hereunto subscribed our names as Vice-President and Assistant Secretary, respectively, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 31st day of January, A. D., 1911.

EDGAR F. DODSON,

Assistant Secretary.

JOHN H. WIGHT,

Vice-President.

[SEAL.]

STATE OF MARYLAND,

City of Baltimore, ss:

On this 31st day of January, A. D., 1911, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came John H. Wight, Vice-President, and Edgar F. Dobson, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed,

the preceding instrument, and they each acknowledged the
684 execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are

the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[SEAL.]

FRED S. AXTELL,

Notary Public.

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Clerk's Certificate.

UNITED STATES OF AMERICA,

Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing 684 pages, (in two volumes), to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1124, wherein W. S. Tevis, W. H. McKittrick and The Pacific Surety Company were appellants, and Jepp Ryan, T. C. Ryan and E. B. Ryan were appellees, including the Judgment Roll, Original Papers not included in the Judgment Roll, Plaintiffs' and Defendants' Exhibits, Reporter's Transcript of Testimony, Minute Entries and Bond on Appeal from the District Court, Opinion, Judgment, Motions for Re-hearing, Remittitur, Opinion on Re-hearing, Remittitur, Final Judgment, Petition for Writ of Error, Order granting Writ, Assignment of Errors, Supersedeas Bond, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Writ of Error and Citation are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 30th day of January, A. D. 1912, at Phoenix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,

Clerk Supreme Court of Arizona.

In the Supreme Court of the United States.

WILLIAM S. TEVIS, WILLIAM H. MCKITTRICK, THE UNITED SURETY Company, a Corporation, and The Pacific Surety Company, a Corporation, Plaintiffs in Error,

VS.

JEPP RYAN, THOMAS C. RYAN, and E. B. RYAN, Defendants in Error.

Writ of Error to the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Territory of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment or decree, which is in the said Supreme Court of the Territory of Arizona before you or some of you, between William S. Tevis, William H. McKittrick, The Pacific Surety Company, a Corporation, and the United Surety Company, a Corporation, Plaintiffs in Error, and Jepp Ryan, Thomas C. Ryan and E. B. Ryan, Defendants in Error (a cause wherein a judgment was rendered against said Plaintiffs in Error, for a sum in excess of Five Thousand Dollars, exclusive of costs, by the Supreme Court of the Territory of Arizona) a manifest error has happened, to the great damage of said Plaintiffs in Error, as by their complaint 687 appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you that, if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same in the said Supreme Court at Washington, District of Columbia, on the 3rd day of March, 1912; that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 3rd day of January, in the year of our Lord, One Thousand Nine Hundred and Twelve.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
*Clerk of the Supreme Court of the
Territory of Arizona.*

Allowed by

EDWARD KENT,

*Chief Justice of the Supreme Court of
the Territory of Arizona.*

688 [Endorsed:] No. 1124. In the Supreme Court of the United States. William S. Tevis, William H. McKittrick, The United Surety Company, a corporation, and The Pacific Surety Company, a corporation, Plaintiffs in Error, vs. Jepp Ryan, Thomas C. Ryan and E. B. Ryan, Defendants in Error. Writ of Error. Filed Jan'y 3 1912. F. A. Tritle, Jr., Clerk.

689 In the Supreme Court of the United States.

WILLIAM S. TEVIS, WILLIAM H. MCKITTRICK, THE UNITED SURETY Company, a Corporation, and The Pacific Surety Company, a Corporation, Plaintiffs in Error,

vs.

JEPP RYAN, THOMAS C. RYAN, and E. B. RYAN, Defendants in Error.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to Jepp Ryan, Thomas C. Ryan, and E. B. Ryan, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, in the District of Columbia, within Sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the Territory of Arizona, wherein William S. Tevis, William H. McKittrick, The United Surety Company, a Corporation, and The Pacific Surety Company, a Corporation, are plaintiffs in error, and you, Jepp Ryan, Thomas C. Ryan and E. B. Ryan, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the said Supreme Court of the United States, this 3rd day of January, in the year of our Lord, One Thousand Nine Hundred and Twelve.

[Seal Supreme Court of Arizona.]

EDWARD KENT,

*Chief Justice of the Supreme Court of
the Territory of Arizona.*

Attest:

F. A. TRITLE, JR.,

Clerk of Supreme Court of Arizona.

690 Service of the foregoing citation, by copy, and also the writ of error mentioned therein is hereby acknowledged this 13th day of January 1912.

EUGENE S. IVES,
NEALE & SUTTER,
J. T. KINGSBURY,

*Attorneys for Jepp Ryan, Thomas C.
Ryan, and E. B. Ryan.*

691 [Endorsed:] In the Supreme Court of the United States. William S. Tevis, William H. McKittrick, The United Surety Company, a corporation, and The Pacific Surety Company, a corporation, Plaintiffs in Error, vs. Jepp Ryan, Thomas C. Ryan and E. B. Ryan, Defendants in Error. Citation. No. 1124. Citation. Filed Jan'y 16, 1912. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 23,053. Arizona Territory Supreme Court. Term No. 189. William S. Tevis, William H. McKittrick, The Pacific Surety Company and The United Surety Company, plaintiffs in error, vs. Jepp Ryan, Thomas C. Ryan and E. B. Ryan. Filed February 12, 1912. File No. 23,053.

RECEIVED
DEC 20 1913
JAMES D. WARD
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 169.

**WILLIAM S. TEVIS, WILLIAM H. McKITTRICK, THE
PACIFIC SURETY COMPANY, AND THE UNITED
STATES SURETY COMPANY, PLAINTIFFS IN ERROR,**

vs.

JEFF RYAN, THOMAS Q. RYAN, AND E. B. RYAN.

**IN ERROR TO THE SUPREME COURT OF THE TERRITORY
OF ARIZONA.**

BRIEF FOR PLAINTIFFS IN ERROR.

**A. B. BROWNE,
ALEX. BRITTON,
EVANS BROWNE,
EDWARD H. THOMAS,**
Attorneys for Plaintiffs in Error.

**BEN GOODRICH,
A. C. BAKER,**
Of Counsel.

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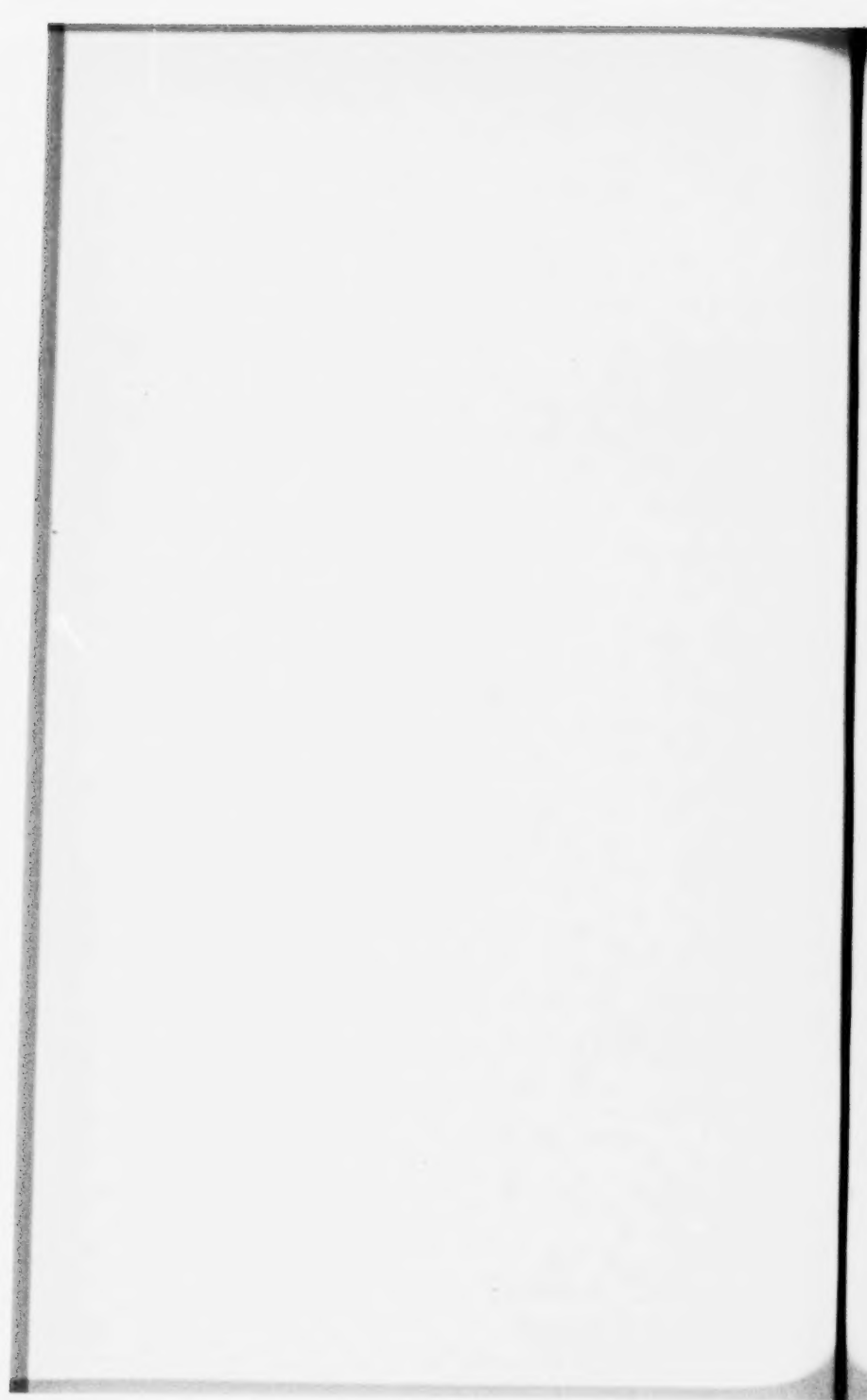
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1913.

No. 189.

WILLIAM S. TEVIS, WILLIAM H. MCKITTRICK, THE
PACIFIC SURETY COMPANY, AND THE UNITED
STATES SURETY COMPANY, PLAINTIFFS IN ERROR,

vs.

JEPP RYAN, THOMAS C. RYAN, AND E. B. RYAN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY
OF ARIZONA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is an action for breach of contract brought by the defendants in error against the plaintiffs in error in the District Court of Cochise County, Territory of Arizona (R., 1-8, 15-23, 49-62, 62-79). The parties on this record will hereafter be referred to as defendants and plaintiffs respect-

ively. In the suit as originally filed, the Western Company, a corporation of California, was joined as a party defendant, but before the trial an order was entered dismissing the case as to that company (R., 92). Prior to this dismissal, a writ of attachment was sued out and levied upon the property of the Western Company, and of Tevis and McKittrick (R., 28-29). The property so levied upon was replevied by giving bond for the value of such property, estimated at \$104,900, on which bond the Pacific Surety Company was the surety, and in this manner the surety company became a party to this action. The replevy bond nowhere appears in the record, but it is referred to in the judgment of the trial court (R., 100), as well as in the opinion of the Supreme Court of the Territory (R., 344).

Plaintiffs filed an original and three amended complaints in succession (R., 1-7, 15-23, 49-62, 62-79). The defendants interposed a demurrer and answer to the third amended and supplemental complaint (R., 79-90), which demurrer was sustained as to the first two causes of action stated in the complaint and overruled as to the third cause of action therein stated (R., 326). Defendants made a motion to strike out portions of this complaint (R., 94-97), and this motion was sustained as to certain clauses in the second paragraph of the third cause of action set out in the complaint, and overruled in other respects (R., 326); but this did not change in substance the cause of action as it appears at Record, 70-79. The case was tried on the third cause of action of the third amended and supplemental complaint and the answer of the defendants thereto (R., 221). Before trial the case was transferred to the District Court of Maricopa County (R., 94). The case came on for jury trial on December 21, 1908 (R., 196), and resulted in a verdict and judgment in favor of the plaintiffs against defendants Tevis and McKittrick for \$132,000, and against the Pacific Surety Company for \$104,900 (R., 97-100). On appeal to the Supreme Court of the Territory the judgment was reduced to \$67,435.37 with costs in the trial court

but without costs in the Supreme Court (R., 350-365). The suit, though nominally for the benefit of the Ryans, plaintiffs in the trial court, is in reality for the benefit of one Gleeson, to whom the Ryans assigned all their interest in the contract herein involved, some time in January, 1908, for \$5,000.00 (R., 113-114). Gleeson agreed at his own cost, charge and expense to take all legal measures for the enforcement of the contract.

The circumstances surrounding the making of the contract sued upon were as follows:

The Ryans and Tevis and McKittrick were stockholders of the Turquoise Copper Mining and Smelting Company of Arizona, owning mining properties in Cochise County. The Ryans owned four-sevenths and Tevis and McKittrick three-sevenths of the share stock of that company (R., 198), which consisted of 100,000 shares of the par value of \$10.00 each. The Ryans had contributed about \$90,000.00 and Tevis and McKittrick about \$70,000.00, toward the development of the mines of the Company (R., 200, 231-234), but apparently the affairs of the company were never in a prosperous condition. In 1900 (R., 250) one S. H. Bryant had sold the company three mines (R., 244) for \$40,000 (R., 247), part of which only was paid in cash, and the rest of which was to be paid in installments (R., 250-251). The company defaulted and Bryant brought suit. The company, whose board of directors was controlled at that time by the Ryans, had no money wherewith to pay the Bryant claim (R., 200-201). It was insolvent, and it is clear its stock then had no real value. Bryant secured judgment, levied execution on the property of the company, and the company's mines were sold on July 30, 1902, to T. B. McPherson for \$23,641.29 (R., 103-106, 198). Previous to the execution sale, the plaintiff Jepp Ryan arranged with McPherson that the latter should purchase the mines at the sale, transfer the same to a new company to be organized, and secure reimbursement by the sale of the stock of such company. All

profits over and above the amount invested by McPherson, realized by the sale of such stock, were to be divided between Jepp Ryan and McPherson, "share and share alike". In this fashion Ryan explained to McPherson "he could become sole owner of the mines, thus shutting out his partners, with whom he had had some disagreement" (R., 104, 202, 262). Singularly enough this fraud on the other stockholders is set out in the various complaints filed in this case, and it is proved by McPherson (R., 103 *et seq.*).

The time for the redemption of the mines from the sheriff's sale was to expire on January 31, 1903. Meanwhile, however, the Ryans met defendant McKittrick in Wilcox, Arizona, on November 29, 1902, and the contract sued on was made. Defendant Tevis was not present at this meeting, but he signed the contract later on (R., 203, 261-263). There was some evidence that a preliminary draft of the contract drawn up by the Ryans was objected to by McKittrick as "too much like a promissory note" (R., 204, 227). The contract as signed by the parties, drawn by a newspaper man (R., 205, 263), provides (R., 3-4, 18-19, 45-47, 60-62, 77-79, 205-207):

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan, and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

"Witnesseth, That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County Arizona, and

"Whereas, the parties of the first part now own and control three-sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

"Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital

stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

"Now, therefore, in consideration of, that the capital stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the board of directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47 dollars. Second, to use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part, that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000

when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.

"It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

"It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

"Witness our hands, the day and year first above mentioned.

"WILLIAM S. TEVIS,

"W. H. MCKITTRICK,

"Parties of the First Part.

"JEPP RYAN,

"THOMAS C. RYAN,

"E. B. RYAN,

"Parties of the Second Part."

In accordance with this contract a reorganization of the company was effected. The Ryans resigned as directors, the control of the directorate passed to Tevis and McKittrick, and the capital stock of the company was changed so as to consist of 1,000,000 shares of the par value of one dollar each, which were allotted as prescribed by the contract (R., 175-183). The mines of the company were redeemed from the sheriff's sale, with \$30,000 loaned by Tevis on the company's note (R., 195, 266-267, 303). As the interest on this note became due, new notes were issued therefor (R., 268). The debts of the company were paid in like fashion (R., 268-269). Tevis transferred all these notes to the Western Company of California (R., 269, 303).

The reorganized company under the control of defendants prospered no better than had the old company under plaintiffs' control. It was impossible to sell the treasury stock for any considerable amount. After repeated attempts to realize on this stock defendants succeeded in selling 32,000 shares at twenty-five cents per share, netting \$8,000, but were compelled to sell the remaining 208,000 shares for three-quarters of a cent per share, netting \$1,560 (R., 125, 127-129, 193, 270, 273-274). This money was spent in running the mines, and in paying for a diamond drill, for patents, and for attorneys' and land office fees (R., 288-289). With the diamond drill so purchased defendants drilled 3,600 feet in one part of the mines and 5,600 feet in another without striking ore in paying quantities (R., 270).

Meanwhile, the notes issued to Tevis for advances to the company and transferred by him to the Western Company matured. The Western Company pressed for payment, brought suit on the notes, and secured judgment thereon in Kern County, California, on May 24, 1905, for \$44,078.05. An action was brought on this judgment in Cochise County, Arizona, and on July 20, 1905, judgment was obtained thereon for \$44,549.43 (R., 143-151). On this same day (July 20, 1905) McKittrick secured judgment

against the company for \$9,975.00 for services as general manager of the company from January, 1903, to June, 1905 (R., 151-159). On June 13, 1905, McKittrick notified the Ryans by registered letter of the Western Company's judgment of May 24th previous, and suggested an assessment of five cents per share upon the outstanding stock of the company as a means of discharging its indebtedness (R., 136). So far as the record shows, the Ryans made no answer to this proposal.

On July 21, 1905, execution was levied on the company's mining properties to satisfy the judgments secured by McKittrick and the Western Company. The Western Company bid the property in at a sum just sufficient to pay the judgments and all costs, and on July 11, 1906, the sheriff executed a deed of conveyance of the mines to that company (R., 159-168). Thereafter, on July 18, 1906, the defendants and F. S. Rice, J. L. Schonenback, and E. D. Buss organized the Tejon Mining Company under the laws of Arizona, and two years later the Western Company deeded the mining properties bought by it at the sheriff's sale to the newly organized company "for and in consideration of the sum of fifty-nine thousand eight hundred dollars" (R., 168-172). At the trial Tevis testified that he owned no interest in the Tejon Mining Company and owned no stock in it and that ten shares were put in his name to make him a dummy director (R., 305).

There was some evidence that plaintiff Jepp Ryan made an oral demand some time in May, 1905, upon the defendant McKittrick that the plaintiffs be reinvested with their interest in the company's property, and also that similar demands had been made previous to that time (R., 209-211, 214). A written demand was also made upon the defendants (Exhibit K, R., 172-173), but the date thereof is not stated. However, the recitals of this demand show that it must have been made some time after July 11, 1906 (the date of the sheriff's deed to the Western Company, to which the demand refers). The trial court, conceding the neces-

sity of a demand by plaintiffs upon defendants to put the latter in default, held that the written demand introduced in evidence came too late (R., 321-322).

The jurisdiction of this court over the case arises by reason of the fact that "the sum or value of the matter in dispute" exceeds five thousand dollars, as required by section 245 of the Judicial Code.

Assignment of Errors.

The errors assigned (R., 369-374) reduce themselves to these propositions:

I. That the court below erred in sustaining the ruling of the trial court admitting certain matters in evidence over defendants' objection:

A. In admitting oral declarations, statements, and negotiations of the parties prior to and contemporaneous with the contract sued on to vary, add to and contradict the terms thereof.

B. In admitting the testimony of E. B. Ryan that the first he heard of the Western Company's suit in Cochise County was through Jepp Ryan.

C. In admitting the testimony of T. C. Ryan that he had no notice of the Western Company's suits in Kern County, California, and Cochise County, Arizona.

D. In admitting the testimony of C. M. Reynaud that McKittrick had told him that he (McKittrick) was the owner of the Tejon Mining Company.

E. In admitting in evidence the written demand of plaintiffs upon defendants marked Exhibit K.

II. That the court below erred in sustaining the trial court's instruction that the measure of plaintiffs' damages was four-sevenths of the value of the mining company's property minus the indebtedness to the Western Company.

III. The court below erred in holding that plaintiffs were entitled to recover the value of shares of stock of the Turquoise Company under the facts alleged in the complaint.

IV. That the court below erred in refusing to sustain defendants' assignment of error that no sufficient demand for reinvestment was proved to have been made by plaintiffs upon defendants.

V. That the court erred in holding that the plaintiffs were entitled to recover the value of four-sevenths of the stock of the company less 279,500 shares retained by them, namely, the value of 291,928 shares, which, computed on the basis of the verdict of the jury, was \$67,435.67.

ARGUMENT.

Interpretation of Contract under Assignments of Error II, III, IV, and V.

It is proposed, for convenience, first, to discuss generally the interpretation of the contract under Assignments of Error II, III, IV, V, because if our construction of the contract, which is the foundation of the suit, be found correct, clear error, as assigned therein, was committed by both courts below.

(a) *Brief review of events antecedent to the contract, as shown by testimony adduced at the trial on behalf of the defendants in error.*

The vendor of part of the mining property was one S. H. Bryant and the vendee The Turquoise Copper Mining & Smelting Company.

The date of the organization of this company is not

shown in the record, but it sufficiently appears it was organized before this mining property was acquired from the testimony of the witness Soto, who states (R., 230) that he had held the office of secretary and treasurer "something like 33 or 32 months" prior to November 29, 1902, showing that the company existed in March or April, 1900. In 1900 (month not stated) Bryant sold the mines to Ryan Brothers and McKittrick for \$40,000, of which \$4,000 was cash and the remaining \$36,000 was to be paid in two installments (R., 246, 247, 250, 251). According to Gleason, who put up the money for the suit (R., 253) and obtained an assignment of the cause of action (R., 113), the mines in that district are not sold for cash. They are sold on a percentage of 10 per cent and the purchaser explores the mines, and if he concludes the property is good he pays the balance, and if contra, to use the witness' expression, "they throw it up." Not more than half of the purchase price of the mines was paid and prior to July, 1902, Bryant had brought suit against the company for the balance of the purchase price and obtained a judgment which amounted to \$23,641.29, under which the property was sold at a sheriff's sale, who gave a bill of sale dated July 26, 1902, or August 26, 1902 (R., 105, 104). At the time this suit was brought Jepp Ryan was president and a director and Thomas C. Ryan, E. B. Ryan (his brothers), William H. McKittrick, and P. B. Soto were the other directors (R., 199, 230). The Ryans were in control of the board of directors and Soto was its secretary and treasurer. The latter says (R., 231, 232) that, prior to November 29, 1902, he had disbursed all the money, something like \$160,000, "for the corporation." This money, he says, was paid to him (as treasurer) by the Ryans, McKittrick, and Tevis, "in proportion of the number of shares they owned in the company," *i. e.*, 4/7 and 3/7, as assessments on their stock (R., bottom of p. 233). "for the use of the company." These assessments continued until November 29, 1902 (R., 234). Evidently some of this money was borrowed by Jepp Ryan from McPherson under

the arrangement noted in the statement of facts. This money Jepp Ryan never returned to McPherson and he lost it. It was embraced in two drafts, one of \$1,500 in favor of Soto, as treasurer, to pay the cost of an engineer, August 1, 1902, and another with the same payee drawn on November 29, 1902, for \$1,353.40, for labor and other expenses (R., 105-106). It appears that Soto resigned as secretary and treasurer on December 11, 1902. It further appears (R., 104) that, on July 31, 1902, Ryan made a draft on McPherson for \$23,641.29, which he paid on the strength of his agreement with Jepp Ryan. Later, on November 11, 1903, McPherson received a draft from the sheriff for \$24,525.50, which represented the amount he had originally paid and interest at 8 per cent. *Ryan explained this transaction to McPherson by stating that he had made a new deal with Tevis and McKittrick whereby they were to receive a little more than one-half of the capital stock of the new corporation and McPherson and Jepp Ryan were to receive the rest.* The witness adds: "No part of this stock was ever turned over to me" (R., 106).

The parties to that contract had no title to the property of the company; the Ryans and McKittrick were its trustees, and they and Tevis were creditors and stockholders of the company and bore no other relation to it at the time of the making of this contract.

It thus appears that at the time the negotiations were commenced which resulted in the contract of November 29, 1902, that the company owned a right to redeem the mining property from the Bryant judgment; that the money expended on the property, \$160,000, was the company's money, of which \$90,000 was borrowed from the Ryans and \$70,000 from Tevis and McKittrick. It seems clear, also, that Tevis and McKittrick had a clear right to have the property redeemed from this sale because of the fraud of Jepp Ryan, the president and a director, although they did not know it at the time the contract was made, nor until after all the liabilities had been incurred and changes made

in the situation for which plaintiffs have been held responsible.

It is an important fact, too, that no agency whatever is shown to have existed in McKittrick to act in any manner for Tevis at the time the contract was made and the contract itself excludes the notion of such agency on its face. Nor has any evidence been offered that Tevis at any time ever knew or ratified in any way the statements of McKitt-rick, even if they were admissible in evidence; yet we have the singular result of a joint judgment against Tevis, carrying a great liability, based in part on alleged surrounding circumstances of which Tevis had no knowledge and for which he did not assume responsibility, a judgment in favor of a trustee who had acted in fraud of his trust.

The declarations of an agent are never admissible unless the agency is proved.

Tevis cannot be bound by the following statements of McKittrick made prior to the signing of the contract, viz: that he was "a multi-millionaire and rich and influential, and by putting him in control of this property, or giving us control of the property, we will try to handle it so each of us can get all our money back. I says, Captain, suppose you don't handle it, where do we come in? He says, *If we don't sell the stock we will return to you the property the same as it is today*" (R., 204), and similar statements referred to in the discussion of the admissibility of evidence (*infra*). It is to be noted here that the Ryans had no property in these mines and that the relation continued after this contract as before, namely: the Ryans and McKittrick and Tevis were simply stockholders and creditors, except that Tevis had, and McKittrick probably had also, a right to have the property redeemed from McPherson, no matter what title he had obtained, because of the fraudulent agreement between him and Jepp Ryan.

The agency of Jepp Ryan to act for his brothers is shown by the defendant in error.

E. B. Ryan testified (R., 229) that Jepp Ryan had charge of the transactions in connection with this Turquoise property.

Here is established an agency of Jepp Ryan for his brothers and that McKittrick was not the agent of Tevis.

It follows that the Ryans are bound by the explanation Jepp Ryan made to McPherson that he had made a new deal with Tevis and McKittrick whereby they were to receive a little more than one-half of the capital stock of the new corporation and McPherson and Jepp Ryan were to receive the rest (R., 104). This evidence remains uncontradicted.

Tevis at least is entitled to be subrogated to the rights of McPherson and to have back his money and the stock McPherson was to get instead of paying this judgment. This matter is involved in the very morals of the suit and under the Arizona statute in reference to exceptions is now a proper subject for consideration.

Tevis had the undoubted right to pay the Bryant-McPherson judgment with his own money, anything in the agreement to the contrary notwithstanding.

Gleason, assignee of this lawsuit, for a consideration of \$5,000 (R., 113), stands in no better position because he has necessarily, in his speculation, bought this claim encumbered with all its burdens.

We start, therefore, on a definition of the contract on the basis that Tevis was not bound in any way by any representations of its intent or meaning made at the time or before it was signed, and as to McKittrick, on the basis that his representations were purely promissory, expressing matters of opinion and belief, unsupported by any valuable consideration, and that in any event he was innocent of any wrong dealing. We start on the basis that no fraud exists because the element of fraud has been eliminated.

(b) *The interpretation of the trial court on the motion of plaintiffs in error to direct a verdict in their favor (R., 255-259).*

This motion was denied and an exception taken at the close of the case for the defendants in error (R., 259). This motion was renewed at the close of the whole case and an exception was then taken (R., 319).

The court construed the contract upon "the intent of the parties," influenced, no doubt, by the inadmissible evidence before it. It was the idea of the court that the defendants in error at the end of two years were "to be put back in the position they were in before the contract was entered into" unless the stock was sold for enough to pay the judgment and \$20,000 to develop the claims (R., 256).

The trial court ruled that there was no liability (R., 256) "until two things had happened: first, a failure to do the things contemplated by the contract within two years, and second, a demand on the part of the plaintiffs to be re-invested." The court held that the scheme of the contract provided that "*the company was to be put on its feet and the indebtedness paid off and the original amount put in by both parties to be paid off from the sale of the other stock;*"

* * * (This was an expectation, not an agreement.) The trial court said that the evidence disclosed "a failure on the part of Tevis and McKittrick to carry out the other part of the scheme; *that is, to sell the treasury stock and pay off the McPherson judgment with it.*" This is incorrect. "Of course," said the court, "the McPherson judgment, as a matter of fact, was paid by loan and no portion of the proceeds of the treasury stock was applied to paying off that loan."

* * *

Said the court: "The parties of the first part,' that is, Tevis and McKittrick, 'shall have the term of two years in which to comply with all the requirements of this contract;' now, that does not mean the sale of the treasury stock as the board of directors might authorize: it must have meant

more than that" (R., 257). Yet this is exactly what the contract said. "Should they fail or refuse," the court adds, "to comply with all the agreements or stipulations herein mentioned"—of course if you take the words agreement and stipulation and construe it strictly *there is no specific agreement on the part of Tevis and McKittrick to do any one particular thing except to sell at such price as the board of directors might specify*; but I think that means, and must be construed to mean, reading the contract all together, a failure to carry out within two years the scheme of the contract."

(c) *The instructions given to the jury by the trial court* (R., 320-324).

The court told the jury that Tevis and McKittrick "did not guarantee successful results—in other words, if at the end of two years these things had not been done as contemplated by the contract Tevis and McKittrick were not under any legal liability to the Ryans for not doing it. In effect what they said by that contract was that they would use their best endeavors to do these things. So, I say, if there was a failure on their part to do these things required by the contract, at the end of two years, that did not raise any legal obligation on the part of Mr. Tevis and Mr. McKittrick to the plaintiffs in the case. *But the contract provided that if at the end of two years this scheme or plan that the contract contemplated had not been accomplished—if Tevis and McKittrick failed to do it—then Tevis and McKittrick agreed by the contract to turn—to reinvest, rather—the Ryans with the interest they had at the time of entering into the contract.*"

This reinvestment, the court told the jury, in effect, was a reinvestment of property in the Ryans (R., 323).

(d) The appellate court in effect sustained this interpretation of the contract by the trial court, but it observes,

"The contract contemplated selling stock of the corporation to the public." The appellate court, however, held that re-investment in property was the same as a reinvestment in share stock, thereby arriving at the same result, except on the measure of damages.

Thus, it will be seen, the plaintiffs in error were held under the contract to have been insurers of the success of the enterprise and guarantors of the defendants in error to the extent of the value of four-sevenths of *the capital stock or property* (Opinion, R., 347), less the value of the shares retained by them, fixed at \$67,435.37 (*id.*, R., 349).

If the evidence of the declarations of McKittrick be eliminated there is no foundation either inside or outside for such a construction.

¶1. A transfer of the management of the corporation was to be made, that was the subject-matter. A change was to be made of the par value of the stock, and \$240,000 of that face value was to be placed in the treasury of the company "to be sold in whole or in part by the parties of the first part, at such price or prices as the board of directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation" (naming the amount). "Second, to use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this company."¶

There was no fraud. That is settled by the court. So far it is clear that the defendants in error only covenanted to sell the stock "at such price or prices as the board of directors may deem advisable."

Tevis and McKittrick did not agree, as the trial court instructed the jury they did agree, "they would use their best endeavors to do these things" (R., 321), that is personally; then if they failed to reinvest the Ryans with the interest

they had at the time of entering into the contract they were obligated to them in damages. The directors of the corporation were to fix the price and use the money in the manner indicated. This was according to corporate law. These officers might or might not be the defendants in error.

Tevis was made vice-president and McKittrick secretary, while the treasurer was the First National Bank of Bakersfield (R., 121).

In fact the authority to sell granted and to be granted to Tevis and McKittrick, the defendants, by the contract was extremely limited.

They were, under the contract, to be merely agents of the board of directors, if that body said so, without the slightest authority to fix the price of the stock, pay the judgment or use the money to develop claims or in any other way. If the board of directors should fail to give such authority Tevis and McKittrick could do nothing. They made no further agreement and no other agreement can be read into the contract without making a contract for them which they did not make.

The defendants in error did not insure or guarantee that the directors would fix a price; they did not covenant or agree that the stock would sell for any price, much less that it would sell for \$20,000 more than the amount of the judgment; they did not promise to find a purchaser for a single share, neither did they imply a promise to pay the judgment or develop the claims.

Again, there was no negation in reference to the payment of the judgment by Tevis in event there was no other way nor that McKittrick should have no claim against the corporation for work done for it. Tevis and McKittrick nowhere agreed, as the trial court said they did (R., 256), to put the company on its feet.

The terms of this agreement merely show the expectations of the parties, which unfortunately were never realized. Raising this money, as well as the profits to arise, were each

decidedly future and contingent. This agreement and the stipulations which follow were conditional, that is, if the stock were sold for a sufficient price then the money should be applied as purposed.

The next provision of the agreement, we assert, is and was illegal, being contrary to public policy, as it affected the rights of stockholders who were to become so by the sale of stock in the company as provided in the agreement.

The provision reads:

"2. The parties of the second part agree to and with the parties of the first part, that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, *and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire.*"

Treating this provision as lawful there is nothing of indemnity, guarantee, or insurance in so far as Tevis and McKittrick are concerned. There was no meeting of stockholders, as such; the agreement is not the minutes of such a meeting, and nothing therein contained could bind the corporation to do or not to do what the agreement required.

The previous considerations lead to what Tevis and McKittrick were to derive in consideration that the *corporation* would authorize the sale of 240,000 shares of stock to be sold by Tevis and McKittrick and the resignation of the officers of the corporation representing the Ryans.

This consideration is:

"3. Said second parties agree to give the parties of the first part as their interest in said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock. That the remaining 200,000 shares shall be divided between the parties hereto in proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the

parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided *pro rata* among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000 when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid."

Thereby was a sale or transfer of a controlling interest in the stock in consideration of a future authority to sell the treasury stock for no particular sum to be given by the corporation to Tevis and McKittrick, including a resignation of existing officers of the corporation. *It is to be noticed that Tevis and McKittrick were not to contribute or pay anything whatever.*

Between the corporation and the shareholders the 240,000 shares of treasury stock was an outright contribution to the corporation which by the terms of the agreement had the right to sell it, and as a contribution the corporation would have had that right independent of any agreement. The corporation was no party to the agreement and Tevis and McKittrick did not undertake to bind it and could not have bound it to return or pay for this stock.

As to the 200,000 shares issued to McKittrick as trustee it has remained in trust subject to the rights of the parties, but here, as before, there was no covenant, promise or agreement by Tevis and McKittrick whether as insurers, guarantors or otherwise to do more than use their best endeavors to sell it. There was no agreement to reimburse at all events the \$160,000, for this money was to be obtained from a particular fund which never came into existence.

To proceed with the next clause of the contract:

"4. It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this

company until the block of 200,000 held in trust for all shall have been sold or apportioned, as above set forth."

No breach of this agreement is claimed.

Again, the contract continues:

"5. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto."

The last clauses of the contract deal with the liability of the parties.

They provide:

"6. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

What meaning should be given the words "comply with all the requirements of *this* contract?" Not some other contract.

The Ryans were not made liable for any of the expenses of operating the company unless the judgment which McKittrick obtained made them liable or reduced their interests. The judgment, however, was only against the company, and the sale of the company's property was made under a different and prior judgment. The word "comply" is defined "to act in or come into conformity, accordance or agreement."—*Standard Dictionary*. "To fulfill; to perfect or

carry into effect; to complete, to perform or execute."—8 *Cyc.*, 408; 6 *Am. & Eng. Encyc. of Law* (2d ed.), 375.

In every respect, it is believed, Tevis and McKittrick acted in accordance and in compliance with the agreement, and, as far as they were concerned, fulfilled it and carried it into effect. In fact, Tevis did more. *No obligation was incurred by Tevis and McKittrick, under the explicit terms of the agreement, if they complied with it, because it was only on their failure to comply that the interest of the Ryans "shall reinvest in them," otherwise the Ryans were not entitled to be reinvested, and hence not entitled to recover.* For the same reason there was no conversion of the stock of the Ryans and the demand was wholly abortive.

Tevis and McKittrick did comply with all the requirements of the contract:

The par value of the stock was changed and \$240,000 thereof was placed in the treasury of the company, and the board of directors on January 26, 1903, fixed the price at which Tevis and McKittrick should sell it (R., 121, 122). The price fixed was twenty cents per share, which was sufficient to raise the money required; 32,000 shares were sold at twenty-five cents per share, netting \$8,000 (R., 125). Later, on February 15, 1904 (R., 124-128), 208,000 shares were sold by the board of directors (not by Tevis or McKittrick) to H. A. Jastro for \$1,560. This money was placed in the treasury of the company and never came into the hands of Tevis and McKittrick.

Tevis did more than he was required to do under the contract.

McPherson, who held the redeemable title to the company's property as trustee, as has been shown, was paid through advances secured from Tevis, for which the company gave its note, later transferred to the Western Company.

The contract did not require him to do this, but he did it and saved the company's property from sale until August

12, 1905 (R., 163). Tevis, as before stated, as against the Ryans, was entitled, we claim, to be subrogated to the McPherson judgment.

AUTHORITIES.

St. John vs. Erie R. Co., 22 Wall., 136.

An agreement to pay dividends on preferred stock of a railroad out of the net earnings of the road does not mean the net earnings of the road as it was when the preferred stock was issued.

The company may, after the agreement, incur new obligations which would diminish the net earnings applicable to such dividends.

NOTE.—It must have been considered that the 240,000 shares of treasury stock might sell for less than sufficient to pay the judgment and \$20,000 to develop claims.

Ogdensburg, etc., R. Co. vs. Nashua, etc., R. Co., 112 U. S., 311.

Where a railroad company agreed to advance to trustees a certain sum of money to be used in running steamers, to be repaid out of a certain fund arising from the business and to be secured by a pledge of stock, and no personal liability for said moneys was reserved as against any of the parties to the agreement, such parties are not liable for any portion of said moneys beyond the amount agreed to be contributed by them to such fund.

Grant vs. Parker, 115 U. S., 51.

An agreement between the members of a "syndicate" formed to purchase the controlling interest in the stock of a mining corporation that one of them should "control the management of the mine" is necessarily subject to such rea-

sonable rules and regulations as the stockholders or directors may adopt for the government of the officers of the company.

A bill in equity to restrain a member of the "syndicate" from acting as a stockholder and director in the company in enforcing such regulations does not lie.

Morris vs. Veach & Co., 111 Ga., 435, 438.

An undertaking to hold a person harmless from liability on a subscription to stock in an incorporated company and from loss or damage or liability as a stockholder in such a company or from loss or damage by reason of connection with the company as a stockholder cannot be held to mean that the person so indemnified will be held harmless if the stock depreciates in market value or for any reason becomes worthless in his hands.

I.

The court below erred in sustaining the ruling of the trial court admitting certain matters in evidence over defendants' objection.

A.

In admitting oral declarations, statements and negotiations of the parties prior to and contemporaneous with the contract sued on to vary, add to, and contradict the terms thereof.

The objectionable evidence may be summarized as follows:

Jepp Ryan testified that prior to the signing of the contract sued upon McKittrick stated to him that Tevis was "a multi-millionaire, and rich and influential, and by putting him (Tevis) in control of the property" of the Turquoise Company defendants would try to handle it so that all interested in the company would get their money back; that if defend-

ants did not sell the stock they would return the property to plaintiffs the same as it was at the time of the making of the contract; that in answer to witness' statement that the contract was not plain and definite enough, McKittrick said that it was "a question of honor," and that defendants wanted to be fair to all parties interested (R., 204-205).

T. C. Ryan testified that a tentative agreement was drafted by the Ryans, whereby all parties could get their money out of the property, which agreement McKittrick refused to sign; that McKittrick asked the Ryans to resign and to allow Tevis to become head of the company; that McKittrick stated that Tevis was a "very rich man—a multi-millionaire—and through his friends" the company could be financed so that all interested would get their money back; that when Jepp Ryan objected to the contract now in suit McKittrick assured him that defendants would see that plaintiffs got their money back, whether defendants performed the contract or not; that plaintiffs would get their money back at the end of the two years, even if defendants did not sell the stock; that the Ryans said that if the contract was as McKittrick explained it, they would sign it; that McKittrick said that Tevis was a very rich man, and if defendants could not sell the stock out in California they would see that plaintiffs got their interest back, and that on the strength of McKittrick's statements defendants signed the contract (R., 216-217).

E. B. Ryan and P. B. Soto were permitted to testify to substantially the same negotiations that Jepp Ryan and T. C. Ryan had testified to (R., 227-231).

The defendants objected to the admission of this evidence by motion to strike out and exception (R., 204), and by objection before admission and exception (R., 217). Under the local statute (see *infra*, p. 60) these exceptions were sufficient to save the questions of law thereby raised for review on appeal or error.

The contract sued upon was a complete legal act. The parties to the contract, contemplating that the scheme for

the rehabilitation of the company might prove to be a failure, determined what their rights should be in that event. The contract provides:

"Should this contract be annulled by any failure of the parties of the first part (defendants) to do any and all things herein required of them, then the interest of the second parties (plaintiffs) shall re-invest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

The rights of plaintiffs must be measured by this provision of the contract, and by this provision alone. Only oral evidence showing what the interest of the plaintiffs was at the time of the execution of the agreement was admissible.

It was error to admit evidence which increased the obligation of defendants under the contract. This evidence in effect changed the contract agreed to into a contract of guaranty by which defendants obligated themselves to save the plaintiffs harmless in the event that the scheme outlined in the contract turned out unsuccessful, and injected into the contract a warranty by defendants that plaintiffs should be no worse off by reason of the contract, or anything done thereunder, than they were previous to the time of the execution thereof.

THE CONTRACT CONTAINS NO GUARANTY.

That the contract as executed contains no such guaranty or warranty, either expressly or by implication, is plain. Its provisions are:

1. That the capital stock of the company shall be changed so as to consist of 1,000,000 shares of the par value of one dollar each, 240,000 shares of which shall be placed in the treasury of the company to be sold at such price as the board of directors may think advisable, the proceeds to be used: first in paying off the McPherson indebtedness of about

\$25,532.47; second, the next \$20,000 to be used in developing the company's claims;

2. That the Ryans shall resign as officers of the company and allow Tevis and McKittrick to elect their own officers;

3. That 280,500 shares shall be issued to Tevis and McKittrick, and 279,500 shares to the Ryans, the remaining 200,000 to be divided between the parties in the proportion of 101,000 shares to Tevis and McKittrick, and 99,000 shares to the Ryans, and to be issued to McKittrick as trustee;

4. That all parties to the contract shall "use their best endeavors to sell, at not less than par, the 200,000 shares of trust stock, the proceeds to be divided *pro rata* between the parties until they have been reimbursed for the money invested by them in the development of the company's property, "amounting to about \$160,000," the stock remaining after this amount has been realized to be divided among the parties to the contract;

5. That the parties shall not sell any of their individual stock until the 200,000 shares of trust stock have been disposed of;

6. That the Ryans shall not be liable for any expense connected with the operation of the company, excepting the expense incurred in the selling of the trust stock;

7. That Tevis and McKittrick shall have two years to perform the contract;

8. That if Tevis and McKittrick "fail or refuse to comply with all the agreements and stipulations" of the contract within two years, the contract shall become null and void;

9. That if the contract is annulled by any acts of Tevis and McKittrick, then the interest of the Ryans shall reinvest in them "in the same proportion and ratio as they held and were possessed of at the signing" of this contract.

There is no language in the contract from which it may even be inferred that the defendants Tevis and McKittrick guaranteed that the amount realized by the sale of the 240,000 shares of treasury stock would be sufficient to pay the McPherson indebtedness of some \$25,000 and to allow an investment of \$20,000 more for the development of the mines, or that the sale of the 200,000 shares of trust stock would net a sum sufficient to reimburse the parties for the \$160,000 they had expended in developing the mines. In the light of the condition of the company at the time of the execution of the contract such an undertaking would have been foolhardy, to say the least. The company, under the control of the Ryans, had not prospered. Though about \$160,000 had been spent in exploiting its mines, its entire property had been sold to satisfy an indebtedness of some twenty odd thousand dollars. The time for redemption from the sheriff's sale was about to expire, and there was no money in the company's treasury with which to redeem its property. Under these circumstances is it reasonable to suppose that the defendants would guarantee that the 240,000 shares of treasury stock could be sold for \$45,000, or that the 200,000 shares of trust stock could be sold for \$160,000? Does not the condition of the company at the time of the execution of the contract conclusively rebut any inference that the defendants intended to assume such an obligation? They made no such guaranty. And yet the evidence complained of tended to inject into the contract such a guaranty and to prejudice the minds of the jury against the defendants.

The injustice of admitting this evidence of prior and contemporaneous negotiations is apparent in this case. The defendant Tevis was not present, either in person or by an agent, when these negotiations were in progress. In making

the representations, whose admission is here complained of, McKittrick did not claim to be acting for Tevis, neither was any evidence adduced to show that McKittrick was so acting. The last clause of the written contract precludes any presumption that McKittrick and Tevis sustained towards each other the relation of principal and agent in these negotiations. That clause provides, so far as pertinent here:

"It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto."

Three times the jury were told that McKittrick had said in substance: Tevis is a multi-millionaire, and we will see that you get your property back (R., 204-205, 216-217, 227-228). This statement and other statements of a like character were not made by Tevis, nor by his agent, nor in his presence; neither is there anything to show that Tevis knew that these statements had been made. And yet, though he had a right to rely upon the writing submitted to him for his signature as being the complete contract of the parties and the measure of his obligation to the plaintiffs, Tevis is bound by the promises claimed to have been made by McKittrick, but not embodied in the written contract, if the admission of the evidence complained of was proper.

It should be noted that this evidence consists principally of promissory representations looking into the future for their fulfillment, and not of representations of past or present facts. Practically the only representation of the latter class is the statement that Tevis is a very rich man, a multi-millionaire, the truth of which is not questioned, and this statement has no significance except in connection with the promise: We will see that you get your money, your property back. The admission of such promissory representations

was improper, because they raised no estoppel, and because they varied the terms of the written contract by adding a guaranty thereto.

THE PROMISSORY REPRESENTATIONS RAISE NO ESTOPPEL.

In *Insurance Company vs. Mowry*, 96 U. S., 544, suit was brought on a policy of insurance containing a clause by which it was provided that if any premium was not fully paid on the day when due, and in the manner provided, the policy should be "null and void and wholly forfeited." The second premium fell due but was not paid. About a month afterwards, the insured died. The premium was paid forty-five days after it was due, and fifteen days after the insured's death. To overcome the effect of the forfeiture provision plaintiff introduced evidence to show "that the agent who induced him to apply for the policy represented to him, in answer to suggestions that he might not be informed when to pay the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required." It was contended that the insurance company was estopped by the agent's representations, to declare the policy forfeited. In reply to this contention the court said (p. 547):

"The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstance that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact,—to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any knowledge. The

only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made."

The court stated the rule applicable here in epigrammatic form in this sentence (p. 548):

"For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing."

The rule of law which prohibits the introduction of parol evidence tending to vary, add to, or alter a written contract that expresses completely the rights and obligations of the parties is well settled. *Wigmore on Evidence*, sec. 2425, states the rule as follows:

"When a legal act is reduced into a single memorial all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."

In illustration of the application of this rule, the author quotes the following extracts from leading cases relating to this question:

"Gibbs, J., in *Pickering vs. Dowson*, 4 Taunt, 779, 786: 'I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and corrects the representations; and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case.'"

"Van Fleet, C., in *Van Syckel vs. Dalrymple*, 32 N. J. Eq., 233: 'What was said during the negotiation of the contract or at the time of its execution must

be excluded, on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned.' "

The parol evidence rule is similarly stated by standard text writers and is applied in the Federal courts.

- Greenleaf on Evidence* (12th ed.) V. I, sec. 275.
Starkie on Evidence (9th Am. ed.), 587.
Union Stock-Yards & Transit Co. vs. Western Land & Cattle Co., 59 Fed. Rep., 49, 57-58.
Arthur vs. Baron de Hirsch Fund, 121 Fed. Rep., 791, 795-796.
Pitcairn vs. Philip Hiss Co., 125 Fed. Rep., 110, 113.
Oelricks et al. vs. Ford, 23 How., 49, 63.
Parish et al. vs. United States, 8 Wall., 489, 490.
Bast vs. Bank, 101 U. S., 93, 96-97.
Martin vs. Cole, 104 U. S., 30, 38-39.
Seitz vs. Brewers Refrigerating Co., 141 U. S., 510, 517-518.
Assurance Co. vs. Building Association, 183 U. S., 308, 318-361.

It is true that this rule does not prohibit the introduction of evidence showing what the circumstances were at the time of the execution of the contract. But representations of a promissory nature and all negotiations prior to and contemporaneous with the written contract are not properly designated as surrounding circumstances.

- Maryland vs. Railroad Company*, 22 Wall., 105, 113.
Union Selling Co. vs. Jones, 128 Fed. Rep., 672, 675.

In the latter case, Mr. Justice Van Devanter, then a circuit judge for the eighth circuit, said:

"If there is uncertainty or ambiguity in the terms employed, the actual condition of things and the

position in which the parties stood at the time of making the contract, may be shown for the purpose of ascertaining the meaning of its terms. * * * *That which may be shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to, and superseded by, the written agreement.*" (Italics ours.)

It was entirely proper, in this case, to admit evidence showing the condition of the company at the time of the contract, the amount of its capital stock, and the division thereof between the parties to this action in order to determine what "the interest" of the Ryans in the company was at that time, and what "interest" was to "reinvest" in the Ryans upon the expiration of the two years' period allowed by the contract. But it was error to admit evidence in regard to any matter except the circumstances surrounding the making of the contract, and in particular it was error, under the principles announced in the cases cited, to admit evidence relating to the preliminary negotiations, preceding the execution of the contract, and to the promissory representations alleged to have been made by McKittrick in the course of those negotiations, but not embodied in the written memorial to which the parties reduced their agreement.

THE CONTRACT IS COMPLETE AND THE PAROL REPRESENTATIONS ARE NOT CONSISTENT WITH ITS TERMS.

The introduction of parol evidence in a case where the action is brought on a written instrument is justified only where two conditions are found to exist: (a) the instrument must not be complete on its face; and (b) the parol evidence must be consistent with and not contradictory to the written terms of the instrument. In *Stowell vs. Greenwich Ins. Co.*, 163 N. Y., 298, these essentials for the introduction of parol evidence under the circumstances stated, were laid down as follows:

"(1) The writing must not appear upon inspection to be a completed contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties; for in such case it is conclusively presumed to embrace the entire contract. (2) The parol evidence must be consistent with, and not contradictory of, the written instrument."

In an earlier case, *House vs. Walch*, 144 N. Y., 418, the same court, applying the rule under discussion, used the following language, which is directly applicable here:

"It is a general rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. * * * While there are certain well established exceptions to this general rule, the case at bar does not come within any of them. This is not a case where the written contract is obviously incomplete, and where parol evidence is essential to make clear its terms. The two essentials in such case are lacking here, viz: Incompleteness on the face of the contract, and the fact that the parol evidence offered is consistent with and not contradictory of the written instrument. Evidence to explain an ambiguity or show the meaning of technical terms is not an exception to the general rule, but is allowed to enable the court to understand the contract as written, and not to contradict or vary the instrument in any particular. *In the case at bar the parol evidence received tended to establish a different contract from that established in the written instrument, and was therefore incompetent.*"

The contract upon which this action is founded appears on its face to be complete. Nothing seems to have been omitted in defining the rights and obligations of the parties *inter se*. Neither of the courts below held that the contract was incomplete in any respect, as shown by an examination of its provisions, and under the decisions the written instrument itself is the standard by which its completeness or in-

completeness must be judged preliminary to the determination of the question of the propriety of the introduction of parol evidence.

Thompson vs. Libbey, 34 Minn., 371; 26 N. W., 1.

Naumberg vs. Young, 44 N. J. L., 331.

In the case first cited, Judge Mitchell, speaking for the court, used the following language, which Mr. Justice Van Devanter quoted in the case of *Union Selling Co. vs. Jones*, *supra*, 674, with the statement that "the law applicable to such a contract (*i. e.*, a contract complete on its face) is nowhere better expressed":

"The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks."

* * * * *

And the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol, any more than what is written."

Furthermore, while it is true that the parol evidence allowed to be introduced in this case is not inconsistent with the language of the contract here sued on, in the sense that it conflicts in a positive manner with any term of that contract, nevertheless, when the contract is construed reasonably in the light of the financial embarrassment of the Turquoise Company at the time the contract was entered into, this evidence, tending as it does to add to the contract a guaranty by Tevis and McKittrick, clashes directly with any reason-

able inference as to the intention of the contracting parties. It is submitted, therefore, that the introduction of the parol promissory representations claimed to have been made by McKittrick, during the course of the negotiations preliminary to the making of the contract, was improper, first, because the written contract on its face appears to be a complete memorial of the agreement of the parties; and secondly, because that evidence conflicts with the language of the contract reasonably construed in the light of the surrounding circumstances.

A GUARANTY CANNOT BE ADDED TO A WRITTEN CONTRACT
BY PAROL.

Considered as an attempt to add a guaranty or warranty to the contract, the admission of this evidence was erroneous.

De Witt vs. Berry, 134 U. S., 306, 312.

Seitz vs. Brewers' Refrigerating Co., 141 U. S., 510,
517.

Van Winkle vs. Crowell, 146 U. S., 42, 48-49.

Seitz vs. Brewers' Refrigerating Co., *supra*, was a case in which the plaintiffs sued the defendant to recover part of the purchase price of a refrigerating machine manufactured by the plaintiff for the defendant. The parties had made a written agreement whereby plaintiff undertook to manufacture and furnish the machine in question, and the defendant agreed to pay \$9,450 therefor. In his answer to plaintiff's complaint the defendant alleged among other things, "that the machine placed in defendant's brewery was worthless and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the aforesaid agreement." The evidence introduced by defendant tended "to show that prior to the execution of the contract, plaintiff's agents had represented that the machine would cool 150,000 cubic feet to 40 degrees Fahrenheit," and that the machine furnished to defendant was not as rep-

resented. This court, holding that the written contract was the measure of the rights and liabilities of the parties *inter se*, and that the parol representation, antedating the contract, in regard to the capacity of the refrigerating machine, was no part of the contract and could not be relied upon in defense of the action for the purchase price of the machine, said (p. 517):

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking, were reduced to writing."

* * * * *

"Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of that particular machine. *To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question.*"

ADMISSION OF PAROL REPRESENTATIONS WAS PREJUDICIAL
TO DEFENDANTS.

Adhering to the language of the court in *Renner vs. Bank of Columbia*, 9 Wheat., 581, 587-588, that "there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement," it is submitted that the admission of the parol evidence complained of was error. This further question now presents itself: Is that error reversible error? The rule in this regard as laid down in the decisions of this court, is that where error is shown, a reversal will be granted unless it is clear beyond all doubt that the error was not and could not have been prejudicial to the complaining party's rights.

Deery vs. Cray, 5 Wall., 795, 807-808.

Smith vs. Shoemaker, 17 Wall., 630, 639.

Mexia vs. Oliver, 148 U. S., 664, 673.

In the case first cited the court said:

"We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of the rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights."

And speaking more particularly of the erroneous admission of evidence as reversible error, the Circuit Court of Appeals for the Ninth Circuit, said, in the case of *United States vs. Honolulu Plantation*, 122 Fed. Rep., 581, 583:

"Material evidence erroneously admitted in a trial before a jury is always reversible error, unless it can properly be said that such admission was, without doubt, without injury."

Does it appear so clearly as to be beyond doubt, that the admission of the parol promissory representations asserted to have been made by McKittrick in the course of the negotiations leading up to the making of the contract sued upon did not prejudice and could not have prejudiced the defendants? An examination of the evidence in the case bearing upon the question of plaintiffs' damages, not only fails to overcome the presumption of prejudice arising from the very fact of the admission of the improper evidence complained of, but shows affirmatively that that evidence in all probability prejudiced the minds of the jury against the defendants and directly affected the amount of the plaintiffs' recovery.

The trial court instructed the jury that, assuming defendants' liability on the contract, the measure of plaintiffs' recovery was four-sevenths of the net value of the property of the Turquoise Company at the time of the alleged breach, to be determined by taking the gross value of the company's property and deducting therefrom the amount of the company's indebtedness to the Western Company, namely, \$39,000 (R., 323). Under this instruction the jury returned a verdict of \$132,000 for the plaintiffs (R., 332). The Supreme Court of Arizona, holding that plaintiffs were entitled to recover four-sevenths of the net value of the property of the company minus the 279,500 shares of stock issued to and held by plaintiffs, whose value was to be measured by $279,500/1,000,000$ of the net value of such property, and assuming that, on the basis of the jury's verdict, the total net value of the company's property was \$231,000 (of which \$132,000 is four-sevenths), directed a reversal of the trial court's judgment unless the plaintiffs should file a remittitur in the amount of \$64,564.63, the assumed value of the 279,500 shares of stock owned by the plaintiffs, deduced in the manner indicated.

The evidence in the case regarding the value of the company's mines was conflicting and contradictory. T. C. Ryan testified that the mining properties of the company "were worth half a million dollars" in November, 1904

(R., 222). S. H. Bryant testified that the properties were worth about \$400,000 (R., 247). John Gleason, to whom the Ryans had assigned their rights under the contract in suit before this action was begun (R., 113), also estimated that the mines were worth about \$400,000, though he conceded that that was not their cash value, but was what they would bring if sold on bond with ten per cent cash payment and the remainder payable in installments over a period of time, thus giving a purchaser an opportunity to exploit the mines, determine whether his purchase was a good one, and, if he found that the total contract price was too large, allow him to throw up the contract and lose thereby only the installments already paid (R., 252-253). McKittrick stated that he could not tell the cash value of the mines, that "no one could tell," and that their value was "simply speculative" (R., 287). George K. Reed, a mining engineer, testified that the market value of the mines was "very slight, but they might have a speculative value of \$50,000" (R., 312). Levi Theirs, likewise a mining engineer, stated that "on a speculative value they (the mines) might be worth forty or fifty thousand dollars" (R., 313). This was all of the evidence, besides the amount realized at the two execution sales, regarding the value of the mines belonging to the Turquoise Company that the jury had before them as a basis for their verdict. Assuming the correctness of the finding of the Supreme Court of Arizona, that the jury estimated the value of these mines at \$231,000, it is obvious that the jury accepted neither the evidence of value adduced by the plaintiffs nor that introduced on behalf of defendants. That the evidence of defendants in this matter was more reasonable seems clear. Although the Turquoise Company had an outstanding indebtedness of only about \$25,000, the defendants in control of the company were unable to do anything with its mines. The stock of the company commanded no price on the market. The company was able to realize only about \$9,500 by the sale of the 240,000 shares of treasury stock,

which constituted about one-quarter of the total share stock of the company. Well might the jury have found, in view of all the evidence in the case, that the value of the mines was forty or fifty thousand dollars, or even less. What the jury seems to have done, however, is to have reached its verdict by taking the mean between \$500,000, the maximum value claimed by plaintiffs, and \$40,000, the minimum claimed by defendants, and to have taken four-sevenths of the mean value. In the light of this can it be said that the statements, claimed to have been made by McKittrick in regard to the financial standing of Tevis, to the effect that Tevis and he would see that plaintiffs got their money back, if the scheme outlined in the contract did not work out successfully, did not bias and prejudice the minds of the jury against the plaintiffs, and can it be said that it clearly appears beyond doubt that this parol evidence failed to influence the jury in resolving every doubt and uncertainty they may have had as to the value of the mines in favor of plaintiffs and against defendants?

That the parol representations attributed to McKittrick may very well have affected the jury's verdict is further demonstrable. The evidence showed that the plaintiffs had invested about \$90,000 in the mines. This investment must have been made some time prior to April or May, 1902 (before the recovery of the Bryant judgment, under which the property was sold to McPherson). The jury's verdict was returned approximately six and one-half years later, that is, on December 24, 1908 (R., 331-332). Add to the \$90,000 invested in the mines by plaintiffs, which, according to the parol evidence in the case the defendants had undertaken to return to plaintiffs, interest on that sum at six per cent for six and one-half years, and the jury's verdict of \$132,000 is approximated. Can it then be said that it appears beyond all reasonable doubt that in reaching their verdict the jury were not influenced by the parol promise claimed to have been made by McKittrick, "We

will see that you get your money back," and that the jury did not seek to reimburse the plaintiffs in accordance with the alleged parol undertaking of defendants, for the amount plaintiffs had advanced in the development of the company's mines?

REMITTITUR DOES NOT CURE THE ERROR.

The prejudicial error committed by the court below in sustaining the direction of the trial court admitting in evidence the parol evidence here complained of is not cured by the remittitur by plaintiffs of a sum equivalent to the assumed value of the 279,500 shares of stock. If this action had been brought to recover the value of 291,928 shares of stock, as the court below held, in effect, it should have been, this evidence would not have been admissible and its admission would have constituted reversible error for the reasons already pointed out. The jury's verdict was based on all the evidence in the case, good and bad, admissible and inadmissible, and it cannot be said that the evidence legally inadmissible did not, beyond all question, affect that verdict. In the case of *Jayne vs. Loder*, 149 Fed. Rep., 21, 23, the judgment of the trial court attempting to cure, by remittitur, the admission of incompetent evidence, was reversed, the court saying:

"The error which was so committed is manifest. The admission of incompetent evidence could not be cured in any such way. The verdict rendered is based on the whole of it, good and bad, and there is no means of knowing by what items the jury were influenced, or how far the items which are now allowed were accepted by them, or entered into their calculations. As it stands the verdict is judge-made; the only virtue in it being that it is within the amount assessed by the jury. But that coincidence does not help it, the amount so found being the result of evidence improperly submitted for their consideration, the only remedy for which was to grant a new trial."

And in *Galveston R. Co. vs. West*, 85 Tex., 431; 22 S. W., 957, the court, speaking of the propriety of attempting to cure the effect of improper evidence by a remittitur, said:

"This (a remittitur) should never be allowed where the error may have had an influence upon the general verdict."

B.

The court below erred in sustaining the trial court's ruling admitting the testimony of E. B. Ryan that the first he heard of the Western Company's suit in Cochise County was through Jepp Ryan.

C.

The court below erred in sustaining the trial court's ruling admitting the testimony of T. C. Ryan that he had no notice of the Western Company's suits in Kern County, California, and Cochise County, Arizona.

These two errors present the same question of law and will therefore be considered together. The record shows that the admission of the testimony complained of was objected to by defendants and proper exception was noted to the order of the court overruling the objection (R., 217-218, 228-229).

There was no duty resting upon defendants to keep plaintiffs informed in regard to the status of the company. There is nothing in the contract from which the assumption of such duty by defendants may be inferred. In the absence of some provision in the contract covering this matter the rights of the plaintiffs to notice of the company's condition and business transactions and the duty of defendants to bring home to plaintiffs notice of such matters depend upon common-law principles. The plaintiffs were stockholders, the defendants directors, of the company. That the defend-

ants as such directors were not duty bound to inform plaintiffs of every business transaction to which the company was a party, and particularly of every suit brought by or against the company, is too clear to require citation of authority. If the rule were otherwise half the time of the directors of a company would be taken up in notifying stockholders of the business affairs of the corporation, to the obvious disadvantage of the corporation itself, and necessarily also to the detriment of the stockholders. It is believed that no case can be found in which it has been ruled that the law imposes upon directors such a duty. It is not denied for an instant that stockholders have the right to keep themselves informed as to the affairs of the corporation by examining the corporation's books under proper circumstances, etc. But this is obviously far different from imposing upon the directors the affirmative duty of informing stockholders concerning such matters.

It follows, we submit, that the testimony of E. B. Ryan that the first he heard of the Western Company's suit in Cochise County was through Jepp Ryan, and the testimony of T. C. Ryan that he had received no notice of the suits brought by that company in Kern County, California, and in Cochise County, Arizona, was legally immaterial. It is unreasonable to suppose that the jury knew that defendants, as directors of the company, were not in duty bound to inform the plaintiffs of these suits. This testimony tended to prejudice the jury against defendants by creating in their minds an impression that defendants were keeping the plaintiffs in ignorance of the affairs of the company in order that defendants might not know upon the expiration of the two years' period allowed in the contract whether defendants had fully performed the contract or not.

In determining whether or not the admission of the evidence here complained of was prejudicial error much of the argument under I A is directly in point. Applying the principle there laid down, it is submitted that it does not clearly appear beyond question that the introduction of the

objectionable evidence did not injure defendants. Hence the admission of this evidence constitutes reversible error.

This evidence was prejudicial and inadmissible. Fraud and deceit were abandoned. The right to recover the property or its value was a right which belonged to the original company and not to any or all of its shareholders, and the right, if any, to hold the property as a *bona fide* purchaser belonged to the new company and not to its shareholders. The evidence neither afforded a guide to the construction of the contract nor a rule for the measurement of damages for its breach.

D.

The court below erred in sustaining the trial court's ruling admitting the testimony of C. M. Reynaud that McKittrick had told him that he (McKittrick) was the owner of the Tejon Mining Company.

This testimony, properly objected and excepted to by defendants, appears at page 242 of the record. The exact language of the witness is:

"The Captain (*i. e.* McKittrick) told me that he
"was the owner of the Tejon Company now and that
"he was running the business himself."

The testimony was not relevant to any issue in the case. The plaintiffs' right of action, if any, arose out of defendants' breach of contract. In the proof of this right of action it was proper and necessary for plaintiffs to prove the contract, together with such surrounding circumstances as threw light upon the language used by the parties therein, if there was any ambiguity or obscurity in that language that required explanation or elucidation, to prove the alleged breach by defendants, which, in this case, was defendants' alleged failure and refusal to reinvest the plaintiffs with a four-sevenths interest in the stock of the corporation, upon the plaintiffs' demand, and also to prove the damages

suffered by the defendants as a result of that breach. The subject-matter of the contract was not the property of the corporation, but the interest of the parties in the capital stock thereof, and conceding for purposes of argument the correctness of the ruling of the court below to the effect that the value of the stock agreed to be returned to plaintiffs was to be ascertained in terms of the net value of the property of the company, the question as to who owned that property subsequent to the breach of the contract was entirely immaterial. If the contract in suit was breached by defendants, that breach occurred about May, 1905 (R., 210, 284) when, according to Jepp Ryan's testimony, a demand was made upon McKittrick that the Ryans be reinvested with a four-sevenths interest in the property of the company. This was fixed by the court below as the time of the breach (R., 347). Conceding that there was a breach of the contract by defendants at that time, the damages to which plaintiffs were entitled must be determined by ascertaining the value of four-sevenths of the stock of the company at the date of the breach, and the ownership of the property of the company, subsequent to the breach of the contract, when the plaintiffs' cause of action, if any, became fixed, had no bearing upon the value of the stock at the time of the breach. Just as the admission of parol promissory representations made in the course of the negotiations leading up to the execution of the contract was improper, so all evidence of what transpired subsequent to the time of the alleged breach by defendants was wholly irrelevant and tended to becloud the issues in the case and to confuse the jury.

In regard to the admissibility of evidence as to transactions subsequent to the demand by plaintiffs upon defendants and defendants' refusal to comply therewith, the trial court said (R., 257):

"I think a fair construction of the terms of the contract is, as I have said, that within two years, a

certain scheme was to be carried out, and if it was not done within two years, then the plaintiffs had a right to be reinvested, and a breach would come on the refusal of Tevis and McKittrick to reinvest them. Now, if that is so, then the plaintiffs have here a cause of action based on this contract which would accrue at the time of the refusal of the defendants to put them back in possession and reinstate them as they were in the first instance. The allegations of fraud contained in the complaint have no necessary bearing on the cause of action as thus construed. The proof with respect to all the transactions of the defendants that took place after this demand was made is immaterial so far as sustaining the plaintiffs' contention in this case, except as to show the measure of damages, because if by these various transactions they put it out of their power to reinvest the plaintiffs with the stock and the management of this corporation, then the measure of damages would be the value of that stock, and the evidence is competent as showing the situation at this time when the suit was brought. But, as I say, the breach occurred in their failure to reinvest them, and that is the time at which the damages must be computed, in other words, the value of the property at that time."

It is submitted that the above portion of the ruling of the court (R., 255-259) on defendants' motion, at the close of plaintiffs' evidence, for a directed verdict contains two inconsistent holdings. The court said, on the one hand, that plaintiffs' cause of action accrued at the time of defendants' refusal to reinvest the plaintiffs with the interest held by them at the time the contract was entered into, and that evidence of transactions subsequent to such refusal was immaterial except on the questions of the measure of damages, and on the other hand, that the breach of the contract consisted in defendants' failure to reinvest plaintiffs on demand, and that the damages recoverable were to be measured by the value of the property "*at that time.*" These statements cannot be reconciled. That the latter is a correct

exposition of the law as applied to the case is too clear to admit of argument. But the court did not tell the jury that this evidence was immaterial.

The admission of the evidence here complained of to the effect that the defendant McKittrick had stated that he was the owner of the Tejon Mining Company, incorporated on July 18, 1906 (R., 169) more than a year after the alleged breach of contract by defendants, to which company the mining properties formerly owned by the Turquoise Company were conveyed on July 20, 1908 (R., 170-171), tended very naturally to prejudice the jury against defendants by creating in the jurors' minds a suspicion that the entire transaction between the parties was a scheme carried to a successful execution, whereby defendants conspired to cheat the plaintiffs out of all interest in the properties of the Turquoise Company and to assume full control thereof themselves in total exclusion of the plaintiffs from such control, and without paying the plaintiffs an adequate consideration for their stock interest in the Turquoise Company.

Applying the test developed in the argument under I A (see p. 38), can it be said that it clearly appears beyond doubt that this evidence did not injure the defendants? We submit not.

E.

The court below erred in sustaining the trial court's ruling admitting in evidence the written demand of plaintiffs upon defendants, marked Exhibit K.

The exhibit admitted in evidence over objection and exception by defendants (R., 254) is as follows (R., 172-173):

"W. S. Tevis, W. H. McKittrick, and The Western Company, a corporation.

"GENTLEMEN: On the 29th day of November, 1902, the undersigned entered into an agreement with W. S. Tevis and W. H. McKittrick, a copy of which contract is enclosed herewith.

"This contract has been faithfully carried out by us but has not been observed by Messrs. Tevis and McKittrick. Instead of selling the treasury stock and with the proceeds paying the judgment in said contract mentioned, Messrs. Tevis & McKittrick sold this treasury stock for a mere bagatelle, rendering it impossible to pay off the judgment and instead of paying off the judgment by the sale of stock, Mr. Tevis loaned the Turquoise Copper Mining and Smelting Company money to pay off the said judgment and took the company's note therefor. This note, it seems, he later transferred to the Western Company and we understand from letters from Messrs. Tevis & McKittrick that the Western Company is owned and controlled by Mr. Tevis.

"Messrs. Tevis & McKittrick then allowed the Western Company to obtain a judgment on said note in Cochise County, Arizona, under which judgment the company's property was sold and bid in by the Western Company, who now hold sheriff's deed therefor.

"As will be seen, it was agreed that the undersigned should not be liable for any expense connected with the operation of said Turquoise Copper Mining and Smelting Company, except the expense of selling the stock held in trust as therein mentioned. Nevertheless, Messrs. Tevis & McKittrick allowed and caused Mr. McKittrick to obtain a judgment against the company of \$9,998.00 for salary as secretary of this company, and under the judgment also the company's property has been sold to the Western Company.

"Now, two years have elapsed and more and none of the purposes or interest of the contract have been carried out, but on the contrary Messrs. Tevis & McKittrick have put it out of their power to comply with said contract and we, therefore, demand that as against us, you agree that said Western Company holds all of the property purchased by them under said judgment in trust and that the undersigned own a four-sevenths ($\frac{4}{7}$) interest therein, said interest to be subject to the payment to the Western Company of $\frac{4}{7}$ of the amount paid to liquidate the judgment mentioned in the annexed contract, with

interest thereon at the legal rate since said judgment was paid, which payment we offer to make within a reasonable time after offer to convey such 4/7 interest to us. If you prefer, you can re-convey said property to the Turquoise Copper Mining & Smelting Company and transfer to us enough stock to make us the owner of 4/7 of the stock in said corporation. In the latter case, we will, within ninety days after an election of directors can be held, cause said corporation to pay off said amount paid on said judgment with interest, or, if you prefer, you can organize another corporation of the same capitalization as said Turquoise Copper Mining & Smelting Company, and convey said property to such new company giving us 4/7 of the capital stock and a majority of the board of directors and we will, within 90 days thereafter, cause such new company to pay off its said amount paid as aforesaid, to liquidate said judgment with interest.

"However, we will, under no circumstances, assume or pay anything on the judgment obtained by Mr. McKittrick for salary or on account of the sale under such judgment.

"JEPP RYAN.

"THOS. C. RYAN,

"By JEPP RYAN.

"E. B. RYAN,

"By JEPP RYAN."

This letter bears no date, but, judging from its statements, it must have been written sometime between July 11, 1906, the date of the sheriff's deed to the Western Company (R., 165-167), and July 20, 1908, the date of the conveyance by the Western Company to the Tejon Mining Company (R., 170-171). Counsel for plaintiffs stated that this letter was served on defendants on September 22, 1906 (R., 254). Admitting the correctness of this date it appears that defendants were not served with the letter until one year and ten months after the expiration of the two years' period stipulated for in the contract, and until about a year and four months after the oral demand claimed to have

been made upon defendants by plaintiffs (R., 210, 284). The good faith of defendants in attempting to have this letter excluded is shown by their offer to admit that a demand was made on the date of the letter (R., 254).

Notwithstanding the refusal of the trial court to exclude Exhibit K as evidence, that court, in instructing the jury, expressly ruled that the demand in the letter, which constitutes this exhibit, came too late to be a basis for plaintiffs' cause of action. The court said (R., 321-322):

"Now you will have in evidence—you will recall that there was a written demand made upon these gentlemen here, filed in evidence, some time in July—I may be wrong about the time—sometime in the summer of 1906. Now, if that was the first demand that was made on Tevis and McKittrick to reinvest the Ryans with the control of this company, it came too late to be a basis for a claim in this suit, for meanwhile the Ryans (or Mr. Jepp Ryan acting for the Ryans) had knowledge of the affairs of the company between November, 1904, and the date of that demand in the summer of 1906. If with full knowledge of what transpired as to these suits, judgments and other things, whatever they were, as testified to here, the Ryans allowed this matter to drift along until the summer of 1906 before making a demand, such demand came too late; and if that was the state of things you ought to find for the defendant in this case irrespective of anything else in the case."

But the court did not strike out the objectionable exhibit, and hence the jury was entitled to give due weight for all other purposes to the statements therein contained and must be held to have given such weight to those statements. These self-serving declarations are pure hearsay, made without the sanction of an oath, and without opportunity for cross-examination.

It is submitted that Exhibit K was not admissible because it is replete with self-serving declarations coupled with

an erroneous construction of the contract made by plaintiffs long after their cause of action, if any, accrued, and hence not forming part of the *res gestæ*, and because it contains an offer of compromise by plaintiffs. An examination of the exhibit reveals the fact that it contains, among others, the following statements open to objection as being self-serving:

1. "This contract has been *faithfully carried out by us (the Ryans) but has not been observed by Messrs. Tevis and McKittrick.*"
2. "Instead of selling the treasury stock and with the proceeds paying the judgment in said contract mentioned, *Messrs. Tevis & McKittrick sold this treasury stock for a mere bagatelle, rendering it impossible to pay off the judgment, and instead of paying off the judgment by the sale of stock, Mr. Tevis loaned the Turquoise Copper Mining & Smelting Company money to pay off the said judgment and took the company's note therefor.*"
3. "Messrs. Tevis & McKittrick then *allowed the Western Company to obtain a judgment on said note in Cochise County,*" etc.;
4. "Messrs. Tevis & McKittrick *allowed and caused Mr. McKittrick to obtain a judgment against the company for \$9,998.00 for salary.*"
5. "Now, two years have elapsed and *none of the purposes or interest of the contract have been carried out, but on the contrary, Messrs. Tevis & McKittrick have put it out of their power to comply with said contract,*" etc.

That these statements tended directly to prejudice the jury against defendants, and in plaintiffs' favor cannot be disputed. All of these statements, if material to plaintiffs' case, should have been proved by primary evidence. The insinuating statements in the exhibit impute to defendant, in couched language to be sure, but in language whose meaning could not be misunderstood by the jury, fraud and deceit in the management of the company's affairs. Conceding that the defendants were liable to plaintiffs in case they had fraudulently managed the affairs of the company

to the plaintiffs' damage, because defendants as directors of the company occupied a fiduciary position in respect to plaintiffs, the minority stockholders of the company, this was not a proper action for the enforcement of that liability, if any. This was an action on the contract, entered into by the parties and the sole questions in issue were: first, what obligations did defendants assume toward plaintiffs under the contract; and secondly, if any of those obligations had been breached by defendants, what damages did plaintiffs suffer thereby. Proof of alleged fraudulent conduct by defendants could obviously have no bearing on the issues raised by these questions and was improper. Fraud was not an issue. In instructing the jury the trial court said (R., 320):

"The plaintiffs do not base their claim for recovery in this case upon any *fraudulent* acts on the part of Mr. Tevis and Mr. McKittrick, but they base their claim, under the testimony and the allegations of the complaint, as they view the testimony, upon the breach of a contract."

Notwithstanding this exposition of the case the court allowed Exhibit K, teeming with malign insinuations of fraud on the part of defendants in the management of the company, to go to the jury.

Exhibit K is further objectionable because it contained an offer of compromise.

Toward the close of the letter plaintiffs suggest three alternative courses for defendants to pursue:

(a) That defendants agree that the Western Company (the purchaser at the execution sale) holds the property formerly owned by the Turquoise Company in trust with an equitable interest in the plaintiffs as *cestui que trustent* to the extent of four-sevenths of such property subject to the payment by plaintiffs to the Western Company of four-sevenths of the amount of the judgment of that company against the Turquoise Company with interest from date of judgment; or

(b) That defendants secure a reconveyance of the mines to the Turquoise Company and transfer to plaintiffs four-sevenths of the stock of that company; or

(c) That defendants organize a new company with a capital stock the same as that of the Turquoise Company and transfer to plaintiffs four-sevenths of the stock of such new company.

Exhibit K was hence inadmissible because: (a) it contained self-serving declarations in regard to the principal issues in the case; (b) it contained veiled charges of fraud on the part of defendants, though this action rests entirely on breach of contract; (c) it contained offers of compromise made by plaintiffs. It should be noted that in suggesting the three alternative courses open to defendants, the plaintiffs offered to pay four-sevenths of the amount of the Western Company's judgment, but *no present tender* was made. In each case the plaintiffs *promised to pay in the future*.

In *Rulofson vs. Billings*, 140 Cal., 252; 74 Pac., 35, plaintiff sued to enforce specifically a contract made with one Hall whereby the latter agreed to adopt and keep plaintiff then seventeen years old as his own son, and upon his death to leave plaintiff all of his property. Defendants claimed Hall's property as legatees and devisees under his will. Plaintiff proved the contract. Defendants introduced evidence of declarations by Hall that he was only plaintiff's guardian. The court held these declarations self-serving and reversed the court below because of their admission. In the course of its opinion (p. 36) the court quoted with approval the following extracts from the opinions of other courts:

"But the declarations of the deceased were not admissible in favor of his estate, to show that he was not indebted to plaintiff. The declarations of a party against his interest are admissible upon the presumption that he would not speak to his own injury unless it were true. *But he cannot make evidence by declarations in his own interest.* The defendants

represent the deceased, and they can prove no declaration of his which he could not."

Weller vs. Weller, 4 Hun., 197.

"A party's declarations are competent evidence against him or his representatives, but cannot be adduced by or in favor of either."

Bristor vs. Bristor, 82 Md., 277.

As to the effect of the admission of such declarations the court said (p. 37), adopting the language of *Lissak vs. Crocker Estate*, 119 Cal., 444, 51 Pac., 688:

"A party cannot after insisting upon the admission of improper evidence over an objection to its admissibility, defend his course by contending that the error was harmless."

And in regard to this same question the court added further (p. 37), quoting from *Estate of James* (124 Cal., 655; 57 Pac., 578, 1008):

"If improper evidence, under objection, has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted, which upon its face tends in any degree to affect the final conclusion of the court."

In *Dempsey vs. Gordon*, 174 Pa. St., 122, where a letter similar to Exhibit K was introduced, the court said:

"It was an argumentative representation of his view of his rights. It was unanswered. It was the declaration of the plaintiff in his own behalf, and was no more admissible because reduced to writing than it would have been if delivered orally."

City of Chicago vs. McKechney, 205 Ill., 372; 68 N. E., 954, was a case in which, as here, plaintiff introduced in evidence a letter written to defendant containing recitals of plaintiff's view of the controversy between him and defendant. In holding that this letter was not competent evidence the court said:

"The city objected strenuously to this part of the letter, but the trial court permitted it to be read. The matter thus allowed to go to the jury was not only incompetent, but it was prejudicial to the city."

And adopting the language of *Rollins vs. Duffy*, 14 Ill. App., 69, the court added:

"It was not the admission of his adversary, but was appellee's own statement and declarations, made long after the difficulties between the parties arose; nor was it any part of the *res gestæ* of the original transaction. It does not need the citation of authorities to show that the declarations of a party made after the transaction is closed, which are merely a recital of the transaction such as the party then chooses to give, and especially offers by him to compromise, cannot be used by him as evidence in his own favor." (Italics ours.)

This case demonstrates that Exhibit K was inadmissible both because it contained self-serving recitals and because it was an offer by plaintiff to compromise.

The following from the opinion of *Hightower vs. Ansley*, 126 Ga., 8, is applicable here:

"One of the issues made by defendant's plea was that there had been no demand for the stock. A letter written by the plaintiff and received by the defendant in which the plaintiff referred to a previous demand as having been made for the stock, and asked if the defendant would reconsider his refusal to comply therewith, was read in evidence over the defendant's objection that it was irrelevant and did not bear upon any issue in the case. The letter itself did not

amount to a demand, and, so far as it referred to a previous demand as having been made by the plaintiff, *it amounted to only a self-serving declaration, and should have been excluded by the court.*"

The importance of excluding from evidence all self-serving declarations is illustrated in the case of *Allen vs. Killinger*, 3 Wall., 480. In that case there were two firms, one at Des Moines and the other at Chicago, with one common member, B. F. Murphy. The Des Moines firm, of which defendant was a member, operated under the name of Murphy and Allen, and was engaged in the business of *packing pork*. The Chicago firm, under the style of Miles Murphy & Co., was engaged in the business of *buying and selling the "hog product"* on commission. The plaintiff, Killinger, was passing through Des Moines with a drove of hogs when he met defendant Allen, and made a contract, the terms of which were disputed, in regard to the hogs. The hogs were killed and packed by the Des Moines firm and sent to the Chicago firm, by whom they were sold. The Chicago firm failed, and neither Killinger nor the Des Moines firm were paid for the hogs. Allen was still solvent. Killinger then brought this suit against Allen, alleging that the latter had contracted not only to slaughter and pack the hogs at Des Moines, but also to forward them to Chicago and sell them there on his (Killinger's) account. Allen's contention was that the contract was only for the slaughtering and packing of the hogs at Des Moines, and had no reference to the sale of the packed product in Chicago. At the trial Miles Murphy, of the bankrupt Chicago firm, was allowed to testify to a conversation with plaintiff Killinger, in which the latter had stated in effect that his contract with Allen called for both the slaughtering of the hogs and the packing of the pork at Des Moines, and also the forwarding of same to Chicago for sale on plaintiff's account. In holding the admission of this evidence to be reversible error the court said (p. 487):

"It seems to us that Killinger's statement to Miles Murphy was mere hearsay, made by the plaintiff in his own favor after the controversy had arisen, in the absence of defendants, and its introduction cannot be justified under the settled rules of evidence.

"But if there ever could have been a justification for such testimony, there can surely be none now. For the plaintiff is permitted now to tell his own story to the jury directly, but under the sanction of an oath and subject to the test of cross-examination. Shall he also be permitted to prove what he said to a third party about the same matter when he was under no oath, and in no danger of cross-question, or contradiction?"

The case cited is unlike the present case, to be sure, in that here the self-serving statements were made directly to defendants, while there such statements were made to a third party. But this difference in fact does not justify invoking a different rule of law. In the instant case, equally as in the case cited, the plaintiffs had an opportunity to tell their own story directly to the jury, under the sanction of an oath and subject to cross-examination, and this renders superfluous, as well as inadmissible, their prior statements, interpreting their rights against defendants, made long after the controversy had arisen.

II.

The court below erred in sustaining the trial court's instruction that the measure of plaintiffs' damages was four-sevenths of the value of the mining company's property, minus the indebtedness to the Western Company.

The exact language of the trial court in the instruction complained of is as follows (R., 322-323):

"But if you think that the plaintiffs are entitled to recover on the theory I have already explained to you, then you go on and discuss what should be the

amount of damages. Now, in that regard, what Mr. Tevis and Mr. McKittrick agreed to do was to put the Ryans back as near as might be in the situation they were in when the contract was entered into. Then this property was about to be sold under foreclosure sale. Subsequently money was raised to pay off, or redeem rather, from this judgment, and the money that was used to redeem from the judgment became a debt against the company. So that, if you do find any damages in the case at all, this debt against the company that took the place of this judgment under which the property was to be sold, is a matter to be considered, because, of course, the Ryans ought not to be put back into possession of their interest in the property free and clear of any such incumbrance, when there was an incumbrance of that kind on it when the contract was entered into. So if you should come to this question of damages at all, you should ascertain the damages in this way. You should ascertain the value of this mining property—this property that was owned by the Turquoise Copper Mining and Smelting Company—at the time the demand of the Ryans to be reinvested was made, if any such demand was made at all—ascertain first the value of that property. Then deduct from that value the amount of this claim of the Western Company, which loaned this money, with interest, which, at that time, amounted to at least \$39,000. Then take that balance, if there is any—the value of the property, from which deduct the \$39,000, and if there is any balance left, that belongs to the plaintiffs and defendants in the proportion that they owned the property—that is, the Ryans four-sevenths and Tevis and McKittrick three-sevenths. So the Ryans would be entitled to four-sevenths of the balance after you deduct from the value of the property the amount of this Western Company's claim—this \$39,000. So, of course, it follows that if the value of the property was not so much as \$39,000, they would not be entitled to anything, because you cannot deduct \$39,000 from—\$30,000 we will say. So, if you find that the value is only \$39,000, or less than \$39,000, you would have to give a verdict for the defendants in any event. If

you find that it is more than \$39,000, you would first have to deduct the \$39,000 from what you do find, before you give the plaintiffs their proportion of the balance."

The instruction as given conforms substantially to the instruction requested by plaintiffs (R., 112).

Under the local territorial statute it was unnecessary to note formal exception to this instruction of the trial court, and the court below in passing upon the legal sufficiency of this instruction in effect so held. That statute provides (section 15, chapter 74, Laws of Arizona, 1907):

"The giving, refusing, or modifying of instructions and every part of charge given to the jury, and all rulings, orders and actions of the court in a case, shall be deemed excepted to without formal exception, and subject to revision by the Supreme Court for error without bill of exceptions."

INSTRUCTION BASED ON AN INCORRECT THEORY OF OWNERSHIP OF CORPORATE PROPERTY.

Throughout its instructions to the jury (R., 320-324) the trial court apparently assumed that defendants were obligated under the contract to reinvest plaintiffs with a four-sevenths interest in the property of the Turquoise Company. This assumption seems to have been made by reason of the fact that at the time the contract was executed the Ryans and Tevis and McKittrick owned all the stock of the Turquoise Company in the proportion of four-sevenths and three-sevenths respectively. But such stock ownership was obviously not synonymous with the ownership of the assets of the company, the legal title to which was at all times in the corporation and not in the stockholders. As stockholders of the Turquoise Company, the parties were entitled to the rights usually incident to stock ownership, that is, to share in any dividends that might be declared, and to participate *pro rata* in the distribution of the assets of the company upon its

dissolution. That was the extent of the interest of both parties in the company and its property, and is obviously quite different in every way *from a direct legal interest in the company's assets*. In the case of *Humphreys vs. McKissock*, 140 U. S., 304, this court, in discussing the relation of stockholders to a corporation and the interest of the former in the corporate assets, said (p. 312):

"Both the commissioner and the court, in confirming his report and entering the decree mentioned, seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. *The property of a corporation is not subject to the control of individual members, whether acting jointly or separately. They can neither encumber nor transfer that property, nor authorize others to do so.* The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, and subject to the conditions prescribed by law."

The Supreme Court of Arizona, however, held (R., 344-346) that defendants were obligated by the contract to reinvest plaintiffs with a four-sevenths interest in the stock of the Turquoise Company, and not with a four-sevenths interest in the property of that company, as held by the trial court. This conclusion was reached by an interpretation of the following clause of the contract:

"* * * the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

The court stated that the word "interest" interpreted in connection with the word "reinvest," by which a previous divestiture was plainly implied, showed that the parties intended that plaintiffs should be restored to the position

occupied by them at the time of the execution of the contract, that is, should receive again four-sevenths of the stock of the Turquoise Company. The court went on to hold that this construction of the contract was further reinforced by the fact that the legal title to the property was in the Turquoise Company, of which the defendants under the contract became directors, and that hence any other construction would not only make the contract meaningless, but would also necessitate the conclusion that defendants had voluntarily assumed to do any act in direct violation of their duty to the company as fiduciaries. Had this ruling been followed by holding that when so reinvested the Ryans could have caused proper steps to be taken by the original company against the new company, either for damages or in equity, the proper result would have been obtained.

But notwithstanding this reversal of the court below on the theoretical construction of the contract, the Supreme Court of Arizona found no reversible error in the instruction of the trial court on the measure of damages here in issue. Conceding that the measure of plaintiffs' damages was the value of four-sevenths of the stock of the Turquoise Company at the time of the demand for reinvestment, that court held that, in view of the showing that the company was insolvent, the value of four-sevenths of its stock and the value of four-sevenths of its net assets were exactly equivalent. For the extraordinary proposition of law upon which this holding was based the court cited *Nelson vs. First National Bank*, 69 Fed. Rep., 798, and quoted therefrom the following sentence (p. 803):

"There is no better or safer criterion to determine the value of stock or of the debt of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities."

The conclusion of the court below in this matter was, therefore, that although the theory on which the jury were instructed to find their verdict may have been wrong, the result reached was right. The exact language of the court was as follows (R., 346):

“When the result is right, though the method of reaching it is wrong, and though the jury may have found their verdict on an incorrect theory of the case, the error is harmless and the judgment will not be reversed.”

NELSON VS. FIRST NATIONAL BANK DOES NOT SUSTAIN
INSTRUCTION ON MEASURE OF DAMAGES.

In the case relied upon by the court below, the bank held a note secured by collateral consisting of the preferred stock of Seymour, Sabin & Co., a corporation of Minnesota, guaranteed by the Northwestern Manufacturing & Car Co., another corporation of that State. After making the loan the bank exchanged this stock for stock of the Minnesota Thresher Co., another Minnesota corporation, which subsequently proved to be worthless.

The statutes of the State of Minnesota provided that whenever a corporation of the State became insolvent, the proper district court of that State might sequester its property, appoint a receiver thereof, sell its assets, distribute the proceeds thereof among its creditors, and wind up the corporation. At the time the collateral security was given both the corporations mentioned therein were in the hands of a receiver, and as well when the bank exchanged the collateral security, and the receiver was proceeding under the direction of the court to wind them up under the statutes.

The bank brought an action on the note against an indorser, who alleged as a defense that it had exchanged this stock for the worthless stock of the Minnesota Threshing Co.,

without his knowledge or consent, and had thereby released him from all liability on the note. The bank replied, among other things, that the collateral stock was worthless at the time of the exchange, and one of the questions at the trial was the value of this stock at the time of exchange. Apparently, from the opinion of the court, the receivers had sold the property of the corporations whose stock was put up as collateral at public auction, and had thereby completely wound up these corporations. It was in this connection that the court said:

"There is no better or safer criterion to determine the value of stock or of the debt of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities; and where the assets are sold at public auction, after ample notice, and converted into money under orders of a court, in accordance with the provisions of the statutes under which the corporations exist, *the amount realized from their sale is ordinarily very conclusive evidence of their value.* The fact that the statutes of a State under which a corporation is organized, constitute the charter of the corporation, must not be overlooked in considering this question. Chapter 76 of the General Statutes of Minnesota of 1878 (Gen. St., 1894, secs. 5889-5911), which provides for the sequestration of the property of these insolvent corporations, and its sale under the orders of the State court, *necessarily conditioned the value of the stock and liabilities of these corporations;* and we should hesitate long before we should hold that the amount obtained for their property at a public sale in accordance with the law of their existence was no evidence of the value of that property.

"Our conclusion is that the general rule adopted by the court below was correct, that proof of the value of the assets and of the amount of the liabilities of these insolvent corporations, and proof of the amount realized from their assets at auction sales made under orders of the court, and the opinions of witnesses as to the value of the stock and the value of the assets, were

all competent evidence tending to show the value of this stock and of the liability of these corporations upon it."

This case, properly interpreted, supports the contention of the plaintiffs in error. Here the value of the property was fixed by the amount realized from the sale under the Bryant judgment, and its value on May 24, 1905, and July 21, 1905, was fixed by the sales under the judgments in favor of the Western Company and McKittrick, respectively. The case, however, is inapplicable as a criterion for valuation of the stock involved in this transaction, because in the case now under consideration, by statutory proceedings the corporations had been wound up and practically dissolved, and the stock was wholly worthless for any purpose, while, in the instant case, the original corporation was not dissolved by the sale of its property, and it had a potential existence. It had the right to redeem this property from the sale, if that sale had been procured by any fraudulent conduct on the part of its directors, and this right, in a proper proceeding, could have been enforced by the Ryans. They were entitled under the contract to be restored to their former status or, in the language of the contract, to be reinvested in that status, and that was all they were entitled to. If the stock was worthless, as seems to be the case, when the contract was made, and was likewise worthless at the end of two years, or at the time of any breach of the contract, then the election by the Ryans of the right to sue for damages is an election to recover nominal damages only. If their election was to be reinvested in or restored to their former status, and their suit is for damages for failure to so restore them to what they might realize, then the damages are of entirely too speculative a character to warrant a recovery. Their proper remedy was to have sought relief in equity for restoration and to have proceeded in the name of the company, as previously indicated.

The language of the opinion of the court in *Nelson vs. First National Bank*, *supra*, relied upon by the court below in sustaining the trial court's instruction on the measure of damages, deserves close scrutiny. In that case the Circuit Court of Appeals, Eighth Circuit, said that there was "no better or safer criterion to determine the value of stock * * * of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities." This statement, it should be noted, is in the negative; *it is not equivalent to a positive affirmation that such a comparison is the best and safest criterion of the value of such stock*. It does not exclude the idea that there may be other criteria entitled to equal weight, and certainly does not convey the idea that the net value of an insolvent company's assets is the *only* criterion of the value of its stock. This latter is what the court below, in effect, held. Under the trial court's instructions the jury were constrained to ascertain the net value of the company's assets by taking their gross value and subtracting therefrom the amount of the Western Company's claim, using the difference as *the sole basis* for the determination of the value of plaintiffs' stock interest in the company. All other facts put in evidence which would have had a bearing upon the value of the company's stock, and hence upon the four-sevenths interest therein to which plaintiffs asserted a right, were absolutely excluded from the jury's consideration. The case of *Nelson vs. First National Bank*, *supra*, lays down no rule that requires such a result. In fact, in that very case other matters were allowed to go to the jury as a basis for the determination of the value of the stock; the net value of the assets of the companies there concerned was only one element required to be considered by the jury in making such determination. This appears from the following extract from the court's opinion (p. 803):

"Our conclusion is that the general rule adopted by the court below was correct; that proof of the value of the assets and of the amount of the liabilities of these insolvent corporations, and proof of the amount realized from their assets at auction sales made under

orders of the court, *and the opinions of witnesses as to the value of the stock*, and the value of the assets, were all competent evidence tending to show the value of this stock and of the liability of these corporations upon it."

Hence it appears that even in the case relied upon by the court below the net value of the company's assets was *only one factor* considered in arriving at the value of its stock. Conceding, therefore, that when viewed alone, the language of the opinion quoted by the court below in this case admits of the interpretation attempted to be put upon it here by that court, that language construed in the light of the facts of record in the case where it occurs fully sustains the contention of the defendants that the net value of an insolvent company's assets is only one factor affecting the value of its stock. In fact, it is believed that no case can be found in which the net value of the assets of a corporation was held to be the sole basis for the ascertainment of the value of its stock.

Moreover, in the case relied upon by the court below, the question whose discussion evoked the statement quoted in the opinion was whether or not evidence showing the comparative value of the assets and liabilities of an insolvent corporation was admissible as bearing upon the value of its stock; and the court merely ruled that such evidence was admissible. This is obviously quite different from a ruling that this evidence is the sole and only criterion of the value of such stock, as the court below in effect held.

THE INSTRUCTION DID NOT DIRECT THE JURY TO FIND THE
NET VALUE OF THE COMPANY'S PROPERTY AS A BASIS FOR
ASSESSMENT OF DAMAGES.

Furthermore, the trial court's instruction was not tantamount to a direction to the jury to assess plaintiffs' damages at four-sevenths of the *net value* of the Turquoise Company's assets at the time of the alleged breach of contract. In the first place there was no evidence adduced by plaintiffs

as to the gross value of those assets at the date of the breach. The court below fixed May, 1905, as the date of defendants' breach (R., 347). But the plaintiffs' evidence of the value of the mining claims was directed to show what that value was in November, 1904, the time of the expiration of the two years' period stipulated in the contract (R., 221-222, 247, 252-253). In examining T. C. Ryan counsel for the plaintiffs asked the witness for his opinion of the value of the mining claims described in the complaint (R., 221). Before the question was answered counsel for defendants stated: "I would like to have counsel fix some date now" (R., 222), and in this suggestion the court concurred. Defendants' counsel then fixed the time as November, 1904 (R., 222). S. H. Bryant was asked to give his opinion of the value of the mines in November, 1904 (R., 247). The witness Gleason was also asked for his opinion of the value of these mines in November, 1904 (R., 252). Conceding for purposes of argument that the trial court's instruction on the measure of damages correctly stated the law, it was incumbent upon plaintiffs to show by a preponderance of the evidence what the net value of the corporate assets was at the date of the breach of the contract, and to show this it was obviously necessary to introduce evidence of the gross value thereof at that date. The absence of such evidence in the record made it physically impossible for the jury to determine what the net value of those properties then was.

In the second place, the court's instruction authorized the jury to deduct only the amount of the claim of the Western Company from the gross value of the Turquoise Company's assets in the ascertainment of the net value of those assets as a basis for the determination of the plaintiffs' asserted four-sevenths interest therein, yet it appears that at the date fixed by the court below as the time of the breach of contract by defendants—*i. e.*, May, 1905 (R., 347)—the Turquoise Company had liabilities other than its indebtedness to the Western Company. Thus the Turquoise

Company owed McKittrick his salary as general manager and secretary at the rate of \$250.00 per month beginning January 26, 1903. This was allowed him by the unanimous vote of the Board of Directors on August 21, 1905 (R., 135-136) and he later recovered judgment against the company in the amount of \$9,975.00 for such services (R., 158). This indebtedness up to the time of the breach of contract could not properly be excluded in the computation of the net value of the company's assets because of the clause in the contract which provides:

"The parties of the second part (the Ryans) shall not be liable for any expense connected with the operation of this company, except the expense of selling the stock held in trust for the parties hereto."

The deduction of the value of McKittrick's services up to the time of breach from the gross value of the assets at that time in order to ascertain the amount of plaintiffs' proportional share in the net assets of the company would obviously not make defendants *liable* for any expense incident to the operation of the company, because defendants would not be charged thereby with the value of such services. The clause in question must be construed in the light of the practice of the parties prior to the contract. That practice had been for the parties to contribute for the operating expenses of the company in the proportion of their stock holding therein. Thus the evidence shows that plaintiffs had contributed approximately \$90,000 and the defendants about \$70,000 in the development of the company's mines (R., 200, 231-234). Apparently the parties considered that because they owned all of the share stock of the company they were partners, and as such liable *pro rata* for all expenses of the company. Hence the clause of the contract now in question, interpreted in the light of such previous practice, means, if it means anything, that plaintiffs shall not be called upon to contribute for the operating expenses of the

company in proportion to their stock ownership in the company's share stock. And to allow a deduction for the value of the services of the company's general manager and secretary in the manner and for the purpose stated would clearly not violate the clause thus interpreted.

In addition to the indebtedness of the Turquoise Company to McKittrick for services, the evidence shows that the company was also indebted for sundry minor items (R., 124-143). If the court below was correct in holding that the value of the stock of a corporation, circumstanced as was the Turquoise Company at the date of the breach, and the net value of the corporate assets are interchangeable expressions, it should at least have held that in ascertaining such net value the jury should subtract the sum of *all of the corporate liabilities* from the value of all the corporate assets. In view of the fact that there is no evidence in the record of the value of the corporate assets at the time of the breach of contract, and in view of the further fact that the trial court in its instruction made it imperative for the jury to deduct only one of the liabilities of the company—though admittedly the largest one—from the gross value of its assets, it is submitted that, even conceding the correctness of the theory of the court below as to the applicable measure of damages, the instruction complained of was erroneous and the verdict of the jury was reached upon an improper basis.

EVIDENCE DOES NOT DISCLOSE FACTS SHOWING NET VALUE OF TURQUOISE COMPANY'S ASSETS.

Finally, defendants contend that there is nothing in the record to show that proof was made of *all* the assets and *all* liabilities of the company. Certainly if the value of the stock is to be gauged by the net value of the assets of the corporation, it should appear that the jury who are to assess the damages have before them evidence showing the value of *all* the company's assets and the amount of *all* its liabilities.

ties. Otherwise it would never be possible to determine, in a given case, whether the verdict of the jury was correct or erroneous, because it could not be said that the evidence was sufficient to enable the jury to ascertain the true net value of the company's assets. The burden of proof was upon the plaintiffs to show the value of *all* the company's assets, and the amount of *all* its liabilities. Proof of the damages sustained was as much part of plaintiffs' case as proof of defendants' breach of contract. The burden of proving both of these elements of plaintiffs' case was upon the plaintiffs themselves. And it cannot be said that plaintiffs have sustained the burden of proving the damages caused by defendants' alleged breach of contract if, as is here conceded for purposes of argument, such damages depend upon the net value of the company's assets, unless they have put before the jury evidence of the value of *all* the assets and the amount of *all* the liabilities of the company. The truth is that, in proving up their case, the plaintiffs adduced evidence of the value of the mining claims of the company on the theory that under the reinvestment clause of the contract defendants were obligated to transfer to the plaintiffs a four-sevenths interest in the mines of the company as such, and not four-sevenths of the total share stock of the company, and hence the plaintiffs made no effort to prove the amount of all the liabilities of the company. This erroneous theory was based upon a misconception of the relation of the parties to the corporate property at the time ~~the contract, for breach of which this action was brought,~~ the contract was made, for breach of which this action was brought. Plaintiffs apparently thought that because they their relation to defendants was that of partners and that they had a direct *legal* interest in the *title* to the corporate property. The court below held the plaintiffs' theory of the case untenable (R., 344-345). It is submitted that with this erroneous theory must fall also the entire case of plaintiffs predicated thereon.

*and defendants owned all
of the share stock of the company.*

THEORY OF DAMAGES APPLIED BY COURT BELOW IS
INCORRECT.

But is the theory of the court below as to the applicable measure of damages correct? The answering of this question requires a consideration of the obligation of defendants under the contract and an examination of the cases pertinent to the question here in issue.

The court below held that, the breach of the contract established, it became the duty of defendants, under the reinvestment clause of the contract, to transfer to plaintiffs enough stock to make, with the stock already owned by plaintiffs, four-sevenths of the entire capital stock of the company. This the court found meant a transfer to plaintiffs of 291,928 shares of stock. The obligation of defendants to transfer that stock matured in May, 1905, according to the court. Now, conceding the correctness of these rulings, the contract between the parties may be considered as one whereby defendants undertook for an adequate consideration to deliver to plaintiffs 291,928 shares of the stock of the Turquoise Company, and the question is: How are the damages for breach of that contract to deliver stock to be ascertained? If a delivery had been made as agreed, there would have been no liability on defendants to respond in damages. By reason of the breach, so it is assumed, defendants were deprived of 291,928 shares of stock on the date set for the transfer thereof, and to make the plaintiffs whole they should be awarded money damages precisely equivalent to the value of the stock on that date. In *Galigher vs. Jones*, 129 U. S., 193, 201, this court adopted the so-called New York rule of damages, which holds that an owner of stock unlawfully deprived thereof is entitled to "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock." This rule "is applicable alike to actions upon contract (for fail-

ure to deliver stock as agreed) as in tort" (for the wrongful conversion of stock). *Barnes vs. Brown*, 130 N. Y., 372, 382. In this case, then, the highest intermediate value of the stock between the date for delivery and a reasonable time thereafter would, in strictness, be the measure of damages. But since there is no proof that the stock fluctuated in value during that period, the measure of damages is the value of the stock on the date when delivery was due. In *Barnes vs. Brown*, *supra*, 382-383, where the action was for breach of contract to deliver shares of stock of an insolvent company, the court used this language, which is directly applicable here:

"In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation. * * * No special circumstances were alleged in the complaint to take the case out of the general rule. Nor was there any fluctuation in the value of the stock succeeding the time for its delivery under the contract to qualify the application of such rule."

When the value of stock or other property is spoken of as the measure of damages, that value is ordinarily the market value. Here, however, the stock had no market value; there was no showing that it was a listed stock. Its value none the less was the measure of plaintiffs' recovery; that value was to be determined in the light of its intrinsic worth.

In *Dyer vs. Rich*, 1 Met. (Mass), 180, plaintiff had agreed to transfer a patent to a corporation, and defendants agreed to transfer to plaintiff ten shares of the capital stock of the company, making a total capital of \$100,000, divided into not more than 200 shares of the par value of \$500 each. Plaintiff transferred the patent to the company, but defend-

ants failed to secure the payment of the \$80,000 into the company's capital and to deliver the ten shares to plaintiff. Chief Justice Shaw stated the rule of damages as follows:

"As to the rule of damages, the court are of the opinion that the plaintiff is entitled to recover the value of the ten shares such as they would have been worth had the full \$80,000 cash capital been paid in, in addition to the \$20,000 which was the estimated value of the patent. The question for the jury is, what would have been the value of ten shares in such a capital stock, raised for and appropriated to such a branch of manufacture, had it been made up at the time stipulated and the company ready to proceed in good faith to operate upon such capital pursuant to their charter? It might have been worth somewhat more or less than the par value; so much as it would have been worth in money we think the plaintiff entitled to recover."

In *Huse & Loomis Co. vs. Heinze* (Mo.), 14 S. W., 756, the situation was somewhat similar to that in the previous case. Plaintiff's assignor, Mrs. Stephens, held options on certain property to which she agreed to get deeds of title in defendant's intestate's name in consideration of \$3,000 cash and \$25,000 in the stock of a company to be formed to develop the property. Plaintiff's assignor got the deeds which defendant's intestate accepted, and for which the latter paid the former \$3,000 as agreed. But defendant's intestate failed to organize the company and to give plaintiff's assignor the stock agreed upon. For this breach of contract plaintiff brought suit. The court said in regard to the measure of damages (p. 757):

"Viewing the contract as a whole in the light of these recognized principles of interpretation, we think it sufficiently clear to support an action for its breach, and that the measure of plaintiff's damages therefor should be based on the fair and reasonable value of the stock in question would have had upon the organization of the company, with interest thereon from

the beginning of this action. The company was 'to be formed for the purpose of developing Creve Cœur Lake as a pleasure resort.' The land obtained was situated on that lake, and the title was taken, not for, but 'in the name' of John Crome, from which it may be fairly inferred (having regard to the evident intent of the agreement as an entirety) that these lands were to form a part of the corporate property. If the evidence disclosed the value of these lands so acquired it would be a fact proper to be considered, in arriving at the real value of the stock in the contemplated company, as an issue of fact. The figures furnished by the contract established the interest of Mrs. Stephens as one-twelfth of the value of the proposed stock, and would be entitled to consideration (for such weight as the triers of fact might give them) in arriving at the amount of plaintiff's damages. What the contract was worth to her, in view of the terms of the agreement, and of the property designed to be acquired thereunder by the proposed company at its inception in consideration of the stock, is the true measure of her loss."

These cases show that in the absence of proof of the market value of stock other methods of ascertaining its value must be used. The important question here is what are the elements of the value of stock not procurable on the market, and therefore without a market value. The following quotations relate to this question:

"Generally, the measures of damages for the conversion of stocks is their market value at the time of conversion, but when, as in the case at bar, no market value can be established by the prices current, it seems to us perfectly competent to resort to other modes of proof to establish its value, and this may very properly be done by proof of its dividend earning capacity; the value of the assets of the corporation and by individual sales of stock not under compulsion."

Trust & Savings Co. vs. Home Lumber Co.,
118 Mo., 447, 461.

"If there is no market value of the stock, there can be, I think, no difficulty in ascertaining its value, *considering the contracts that the company has made, the nature of its business, the amount of the dividends paid, the other facts relating to the value of its property and its income.*" (Italics ours.)

Butler vs. Wright (App. Div.), 93 N. Y. S., 113, 119.

In *Moffit vs. Hereford* (Mo.), 34 S. W. 252, 253, the value of 180 shares of stock in a complexion powder company was in issue. The company had paid large dividends, but its stock was not obtainable on the market. In regard to the measure of damages the court said:

"The market value of a commodity whether it consists of stocks in a corporation or of a more tangible property, is the price at which it commonly sells. The market value of stocks which are listed and upon the market are easily ascertained. Such value and the intrinsic or actual value often vary greatly. Stock that has no intrinsic value may bear a good price in the market, while stock that is intrinsically valuable may be, for certain causes, much depreciated in value. When one is to be charged for the value of stock, the market value should be taken, if it can be ascertained. This is determined in the market at or about the time. 'If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry, a reasonable range in point of time is allowable.' *Douglas vs. Mercedes*, 25 N. J. Eq., 147; *Dana vs. Fielder*, 12 N. Y., 40. If the stock has no ascertainable market value, then the actual or intrinsic value must be taken as a basis. This value may depend on many facts and circumstances, such as the value of the property and assets owned, the dividends paid, the character and permanency of the business, the control of the stock, the management, the markets for articles produced, if a manufacturing concern, and other facts. *The evidence would necessarily take a broad range and would properly be admissible to prove any fact calculated to affect the value.*" (Italics ours.)

In the case just cited and quoted from evidence of the intrinsic value of the stock was admitted because the stock could not be purchased on the market. The company, the value of whose stock was in issue, was in a prosperous condition, earning and paying large dividends. Its entire capital stock was not large and was distributed among comparatively few stockholders. In the instant case, the Turquoise Company, the value of whose stock is in issue, was not in a prosperous condition, and, so far as the record shows, was not earning or paying dividends. Its entire capital stock was relatively large and distributed among only a few stockholders. But these differences in the facts of the two cases do not call for the application of a different principle. In both the problem is the same: What is the value of the stock of the company? In both the absence of a market value for such stock makes necessary a reference to other facts to prove such value. And what is admissible and competent to prove value in one case must be equally admissible and competent in the other. The last sentence of the quotation *supra* is significant: "The evidence would necessarily take a broad range, and would properly be admissible to prove any fact calculated to effect the value." This is certainly radically different from the ruling of the court below that the value of the stock of the company could be shown only by proof of the net value of its assets.

The following statement from *Sedgwick on Damages* (8th ed.), section 257, is in line with the cases cited:

"Where there is no market value, the value of shares must be found *by an examination of the affairs of the company.*" (Italics ours.)

Butler vs. Wright, 103 N. Y. App. Div., 463, is also in point. There the plaintiff brought a bill for the specific performance of a contract to deliver stock not listed or sold or offered for sale on the market. The right to equitable relief was predicated upon the claim that, in view of the absence

of a market price as the measure of the value of the stock, the damages at law would be uncertain and difficult of ascertainment, and hence it was argued that the legal remedy was inadequate. The court dismissed the bill saying (page 470):

"If there is no market value of the stock, there can be, I think, no difficulty in ascertaining its value, *considering the contracts that the company has made, the nature of its business, the amount of the dividends paid, and the other facts relating to the value of its property and its income.*" (Italics ours.)

Applying the principles of these cases and authorities to the instant case the question now narrows down to this: *What evidence in the record other than the value of the company's assets and the amount of its liabilities should the court have instructed the jury to consider in assessing the damages?*

Preliminary to the answering of this question, however, it is submitted that the court should have instructed the jury that the measure of plaintiffs' damages was the value of the stock with which defendants were obligated to reinvest plaintiffs, giving the jury to understand that the primary fact they were to find was the value of the stock and not the net value of the company's assets. This should have been done in order to explain to the jury the real nature of the contract and the obligation assumed by defendants thereunder as a proper basis for the assessment of damages. The contract when made provided for the reinvestment in plaintiffs of certain shares of stock, and the subsequent insolvency of the company did not convert the contract into one for the conveyance to plaintiffs of a *pro rata* share of the property of the company, as the court's instruction would lead one to believe. This the jury should have been told.

EVIDENCE BEARING ON VALUE OF THE STOCK NOT INCLUDED
IN THE INSTRUCTION ON THE MEASURE OF DAMAGES.

Coming now to the question propounded above, it is submitted the jury should have been instructed to consider the following facts in addition to the net value of the assets of the company, as a basis for the computation of the damages recoverable: (*a*) the character of the business in which the company was engaged; (*b*) the personnel of the board of directors and the stockholders; (*c*) the apparent insolvency of company; (*d*) the condition of the company as a business concern; (*e*) the financial standing of the company as bearing upon the likelihood that it would be able to raise funds with which to liquidate its indebtedness exceeding \$39,000, and put its business upon a paying basis; (*f*) the difficulty or ease with which the company had been able to borrow money in the past; (*g*) the market for the company's stock as disclosed by past sales; (*h*) the prices for which its stock had been sold on two occasions with all the circumstances surrounding those sales and the comparative condition of the company at the time thereof and at the time of the alleged breach of contract; (*i*) the fact that the 200,000 shares of trust stock had not been disposed of and the reasons making the sale thereof impossible.

Special consideration should be given to (*e*), (*h*), and (*i*) above. At the time of the alleged breach of contract the company owned undeveloped mining properties. Its indebtedness exceeded \$39,000. Twice—once on April 5, 1904, and again on April 5, 1905—its principal creditor, to whom the company's indebtedness was long overdue, had given notice of its intention to bring suit for the collection of the debt (R., 127, 134). Such a suit would mean precisely what the Bryant suit had meant previously, judgment against the company and the sale of its entire property to satisfy the judgment. In this precarious situation the value of the stock of the company primarily depended upon the

ability of the company to raise the necessary funds for discharging this indebtedness. If the company could raise those funds, and in addition could borrow enough money to put the company upon a paying basis, its stock would be intrinsically valuable; if it could not, its stock was obviously valueless. All the evidence in the case bearing upon the financial history of the company tended to show that its credit was entirely exhausted (R., 116-196). Had the jury been told that the ability of the company to borrow enough money to pay its debts and develop its property so as to earn dividends for the company and its stockholders was an element to be considered in fixing the value of the stock, a verdict for nominal damages would, in view of the evidence in the case, have been inevitable.

Some time prior to March 4, 1904, McKittrick sold 32,000 shares of the treasury stock at 25 cents per share. He reported to the directors that "owing to the present condition of the company, and at the price asked for this stock, he could not sell any more" (R., 125). On April 5, 1904, the directors authorized McKittrick to sell the remaining 208,000 shares of the treasury stock to the highest bidder within thirty days (R., 126-127). Two bids were received, one for $\frac{1}{2}$ cent per share and the other for $\frac{3}{4}$ cent per share, and the latter bid was accepted by order of the board of directors (R., 128-129). After the sale of the 32,000 shares of stock, but before the sale of the 208,000 shares on March 14, 1904, McKittrick notified the Ryans that he thought the stock could be disposed of at 10 cents per share, and concluded his letter by saying: "If you feel that you are prepared to give anything for it we would be glad to have you name a cash figure at which you will be willing to buy" (R., 126). Thus the Ryans were given an opportunity to bid in the stock. This tends to show that the sale of the second lot of treasury stock was entirely fair. In fact, there is nothing in the record except the unsupported allegations of plaintiffs' complaint (R., 73) that in the least impugns the

fairness of either sale. Had the jury been told that they were to determine the value of the stock to which plaintiffs were entitled under the contract, and in doing so might take into consideration, along with other relevant matters, and give due weight to the price which that stock had brought at previous sales viewed in the light of the relative condition of the company at the time of such sales and at the time of the breach, can there be any doubt that the verdict would have been substantially less than it was?

Again, under the contract 200,000 shares of stock were put in trust with the legal title vested in McKittrick and the equitable interest distributed between the parties as *cestui que trustent*. In respect to the sale of this stock the contract provided (R., 78):

"All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value and the proceeds of any of such sales of said block of stock shall be divided *pro rata* among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property, amounting to about \$160,000 when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid."

The testimony of Jepp Ryan shows that none of this stock was sold, notwithstanding his efforts to find purchasers therefor (R., 208). This evidence was certainly relevant on the question of the value of the stock agreed to be returned by defendants to plaintiffs. If the court in its instructions to the jury had told them that this evidence should be considered and given such weight as in their judgment it was entitled to, in ascertaining the value of the stock agreed to be returned to plaintiffs, who can say that the jury's verdict would not have been considerably smaller than it was?

If it be argued that allowing these facts to go to the jury on the question of damages would have reduced the verdict to a nominal sum, the answer is that this makes no difference.

2 Thompson, Corp., sec. 2724:

"Measure of Damages for Failure to Deliver Shares.—Where the breach of a contract consists in the failure to deliver certain stock in a supposed corporation, the measure of damages will be the actual market value of such stock. But if it turns out that the corporation was never formed and the stock never issued, and that if any were issued it would be valueless, the plaintiff can recover only *nominal damages.*"

Conceding that the contract was breached by defendants, their obligation under the contract was to transfer to plaintiffs certain shares of stock. In lieu of such transfer defendants were bound to pay plaintiffs an amount equal to the value of that stock. If the stock was valueless, then the amount recoverable by plaintiffs was obviously limited to a nominal sum, for by such recovery the plaintiffs would be put in precisely the position they would have occupied if they had received the stock. Neither would a verdict for nominal damages have been unjust to plaintiffs. At the time the defendants received the stock under the distribution provided for in the contract, the stock of the company was practically worthless. All the property of the company had been sold on execution to satisfy a judgment. The time for redemption from the sheriff's sale was about to expire, but there was no money in the company's treasury to redeem the property, and the Ryans in control of the board of directors were unable to borrow the necessary sum. If the defendants had not advanced money wherewith to redeem, the company's property would have been irretrievably lost. It needs no argument to show that the stock of a company in such straits can have no value. Hence, it appears that the stock surrendered by plaintiffs under the contract had no value, and consequently the return of worthless stock to the plaintiffs would not have been unfair to them.

Neither can it be successfully maintained that the failure of the court to make its instruction on the measure of dam-

ages sufficiently comprehensive by including therein a statement of the evidence, other than that showing the net value of the company's assets, to be considered by the jury in ascertaining the value of the stock was a mere error or non-direction not available in an appellate court in the absence of a refusal by the trial court to grant a requested instruction specifically covering this matter. In *Ward vs. Cochran*, 150 U. S., 597, 609-610, the trial court gave an instruction, purporting to cover the elements necessary to constitute adverse possession, in which it omitted to mention the elements of the actuality and exclusiveness of the possession. This court held the instruction to be affirmatively erroneous, notwithstanding the fact that a previous instruction stated the law on this point correctly, and the case was accordingly reversed. So in the instant case the inclusion, in the instruction on the measure of damages, of only the net value of the company's assets as gauging the value of its stock, necessarily excluded from the jury's consideration all other evidence legally relevant on this point, and hence necessarily resulted in an erroneous verdict.

When the evidence in the case is examined, it becomes apparent that the instruction complained of mentioned only the one element that tended to enhance the amount of recovery beyond a nominal sum, and failed to mention all other elements that tended to reduce the amount recoverable to nominal damages. In *Evans vs. George*, 80 Ill., 51, 54, the Supreme Court of Illinois disposed of a somewhat similar instruction as follows:

"In the last instruction of the series the court undertook to give to the jury a summary of the principal facts which they were to consider in their deliberations. It directed their attention only to facts favorable to defendant and left out of view all that tended to illustrate plaintiff's theory of the case. It is the duty of the jury to consider all the facts and when the court assumes to direct their attention to the facts it should refer them to all facts so as to present the case fairly for both parties. Otherwise,

the jury might understand the facts stated in the instructions are the only ones necessary to be considered in deliberating on their verdict. (Citing Chicago, etc., Ry. Co. *vs.* Griffin, 68 Ill., 499, where a similar instruction is characterized as highly prejudicial and misleading.) The judgment will be reversed and the case remanded."

III.

The court below erred in holding that plaintiffs were entitled to recover the value of shares of stock of the Turquoise Company under the facts alleged in the complaint.

The third cause of action of the third amended and supplemental complaint (R., 70-77), on which the case was tried, sought a recovery of a four-sevenths interest in the property of the Turquoise Company, and not of four-sevenths of its share stock as provided in the contract. This appears from the frequent references in the complaint to the plaintiffs' interest "in the said properties," meaning the mining claims of the Turquoise Company. In describing the reinvestment clause of the contract, the complaint alleges that if upon the expiration of two years the expectations of the parties were not realized,

"then the defendants would procure the plaintiffs to be reinvested with the same interest in the said properties which they had had prior to the 29th day of November, 1902, and would re-establish the relation and status of the plaintiffs to the said property, so that the plaintiffs' relation to and interest in and to the said property should be substantially and in effect the same as it had been prior to the 29th day of November, 1902, and as it would have been if the said contract had never been made, and without any cost to plaintiffs, excepting the expense of selling the 200,000 shares of stock held in trust by the defendant McKittrick for the parties to said agreement."

Two demands are alleged to have been made upon defendants for the reinvestment of plaintiffs as provided in the contract. Those demands are described as follows (R., 76) :

"On the 15th day of February, 1905, plaintiffs informed defendants that they desired to be reinvested of their interest in the property of the said Turquoise Copper Mining and Smelting Company, and that they desired to be restored to their interest in the property of said corporation the same as plaintiffs had prior to the said 29th day of November, 1902; and plaintiffs informed defendants that they were then ready, able and willing to pay defendants four-sevenths of the sum of \$25,262.60, paid to redeem the property of said corporation, from the said sale of July 31st, 1902, and said defendants ignored said request."

"That on the 29th day of August, 1906, and within twenty days after plaintiffs had discovered that defendants had, by fraudulent and collusive management of the said Turquoise Copper Mining and Smelting Company and its property, caused the title of said property to be vested in the said Western Company, plaintiffs caused a written demand to be served on the said Western Company and on each of the defendants herein requesting them to reinvest plaintiffs with their interest in said property, the same as plaintiffs had prior to November 29th, 1902, and the said Western Company and the defendants entirely ignored said request."

The complaint alleges further that, since February 15, 1905, plaintiffs have at all times been "ready, able, and willing to pay defendants four-sevenths (4/7) of the sum paid by defendants" to redeem the company's property from the sheriff's sale of July 31, 1902, "provided defendants would cause plaintiffs to be reinvested *with their said four-sevenths interest in the property of the said Turquoise Copper Mining and Smelting Company*, as their interest existed before the said 29th day of November, 1902" (R., 76-77).

The *ad damnum* recites, in conformity with the theory underlying the entire complaint, that the "plaintiffs have

been defrauded of their four-sevenths interest in the property of the said Turquoise Copper Mining & Smelting Company, which was at all times herein mentioned worth \$200,000.00, to plaintiffs' injury in the said sum of \$200,000.00" (R., 77).

It thus appears from the allegations of the complaint that plaintiffs sought to recover for the value of four-sevenths of the property of the company which, under their interpretation of the contract, defendants were obligated to convey to them on demand upon the expiration of the two years allowed by the contract in the event that the scheme outlined therein should not work out successfully. With the same theory of the contract in mind plaintiffs introduced the opinions of three witnesses as to the value of the company's property in November, 1904 (R., 222, 247, 252-253), and requested an instruction that the measure of damages was four-sevenths of the value of the company's property, minus the amount of the claim of the Western Company with interest, which instruction was allowed by the court and was the basis of the oral instruction actually given to the jury (R., 322-323). This instruction requested by plaintiffs and marked "given" by the court is as follows (R., 112) :

"You are instructed that if you find that the plaintiffs are entitled to damages under the evidence and instructions of the court, in ascertaining the amount of such damages you shall ascertain the value of the property at the time that the plaintiffs demanded that the defendants reinvest them with their interest therein. You should deduct therefrom the amount of the claim of the Western Company with interest, to wit, \$39,000 and then award the plaintiffs $\frac{4}{7}$ of the balance remaining.

"Requested by plaintiff.

"EUG. S. IVES,
Att'y for Plffs.

"Given.

"E. KENT, *Judge.*"

The written contract of the parties was before the jury as a material part of plaintiff's case (R., 205-206). The court below held that this contract related to the share stock of the company and not to the company's property, and that the obligation of defendants under the reinvestment clause was to transfer to plaintiffs a sufficient number of shares of stock to make with the stock already owned by plaintiffs (*i. e.*, 279,500 shares) four-sevenths of the total share ~~of the~~ stock of the company. Nowhere in the complaint is the obligation of defendants and the correlative right of plaintiffs thus described.

Hence it is evident that the contract described in the complaint as the basis of plaintiffs' cause of action and the contract actually made by the parties, as construed by the court below, are radically different instruments. The subject-matter of the contract averred in the complaint was the property of the company, whereas the subject-matter of the contract proved to have been made by the parties was the share stock of the company.

Allegations descriptive of a contract must be strictly proved, and any difference between allegations and proof in this respect is fatal. This rule is stated as follows in 22 *Encyc. Pl. & Pr.*, 563-565:

"Averments descriptive of a contract must be proved in all material respects, and since a contract is entire and indivisible, any part of a contract which varies materially from the allegations is inadmissible in evidence, or if a contract materially different from that alleged is proved the variance will be fatal in the absence of any steps, statutory or otherwise, to cure it."

* * * * *

"Thus, an absolute contract is not supported by proof of a conditional contract, and an allegation of sale of a specific chattel is not supported by proof of an agreement for the sale of some other chattel. So proof of a contract to sell on commission, or for cash, is variant from an allegation of a contract to sell on

credit, or of a sale and delivery. Likewise there may be a variance with respect to quantity or value or time. If an original contract is alleged, proof of one that is substituted therefor or of an enlarged contract will not support the allegation."

This is but an application of the elementary rule that the proof in a case must correspond to the allegations of the pleading, or there can be no recovery. A complaint must proceed upon a distinct and definite theory, and upon that theory the case must stand or fall; that theory must be abided by to the end. The recovery must be upon the case made by the complaint and the proof, and the complaint cannot be made elastic so as to meet any conceivable evidence that may be introduced, or the changing views of counsel as to the correct theory of the case. Throughout the entire trial of this case counsel for plaintiffs insisted that the action was for a recovery of a four-sevenths interest in the Turquoise Company's property, and it was not until the case reached the Supreme Court of the Territory that counsel shifted their ground and asserted that an action for the value of an interest in the company's property and an action for the value of an interest in its stock were under the circumstances of the case identical, and that hence the case might be considered indifferently as the one or the other sort of action. The fallacy of this contention has been pointed out in the argument relative to the trial court's instruction on the measure of damages.

In *Sheehy vs. Mandeville*, 7 Cranch, 208, suit was brought on a note, accurately described in the declaration except that there was an omission of an allegation as to the time when payment was due. A note payable in sixty days was offered in evidence as sustaining the declaration, but was excluded by the trial court. This court affirmed that ruling, Chief Justice Marshall saying (p. 217):

"Courts, being established for the purpose of administering real justice to individuals, will feel much reluctance at the necessity of deciding a cause on a slip in pleading, or on the inadvertence of counsel. They can permit a cause to go off on such points only when some rule of law, the observance of which is deemed essential to the general administration of justice, peremptorily requires it.

"One of these rules is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer to require that it should be repeated.

"It is not necessary to recite the contract in hæc verba, but if it be recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, the effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence." (Italics ours.)

The above quotation has direct application to the case in hand. The plaintiffs have "declared" on the contract "according to its legal effect," insisting again and again in the complaint that they are entitled to a four-sevenths interest in the company's property. The "legal effect" of the contract should have been "truly stated." But, as has been shown, the plaintiffs "declared" upon one contract and proved another. This variance is real and substantial, even if it be conceded that the trial court's instruction on the measure of damages was correct. The contract of the parties is one thing, and the measure of damages for the breach of that contract is another, and totally different thing. If the company had been abundantly solvent, and its stock had had a market value, there would have been no necessity for the introduction of evidence as to the value of its property. Indeed, such evidence would have been clearly inadmissible. *Cook on Corporations* (6th ed.), section 581. Can

there be any doubt, that if such had been the condition of the company, the complaint in this case seeking a recovery for the value of an interest in its property would have been entirely improper, and would not have been sustained by the contract offered in proof? Does, then, the fact that the evidence tends to show that the company was insolvent at the time of the alleged breach, and the fact that therefore evidence showing the value of the company's property was legally admissible on the question of damages, change a contract concededly having reference to the share stock of the company into one having reference to its physical property, and by relation back make good a pleading which when filed was unquestionably bad? We submit not. Certainly the contract of the parties is not altered because of the character of the evidence admissible to prove the damages consequent upon its breach.

The following cases further illustrate the application of the doctrine of variance:

Alexander vs. Harris, 4 Cranch, 299: A pleading alleging a lease for three years certain, held not sustained by evidence of a lease for one year certain, and a subsequent possession for two years.

Sebree vs. Dorr, 9 Wheat., 588: A declaration setting out a promissory note with no allegation as to place of payment held not sustained by proof of a note specifying a place of payment.

Covington vs. Comstock, 14 Pet., 43, *ibidem*.

In *Ferguson vs. Harward*, 7 Cranch, 409, a contract action, the declaration, by mistake, stated the vendee's name in a context which showed that the vendor was meant. This court held that the variance was not material. Justice Story said (p. 414):

"We are therefore satisfied that the variance is immaterial, because *it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.*" (Italics ours.)

In the present case, however, the variance does "change the nature of the contract" in a material respect, as has been pointed out. Indeed, the language of the Court of Appeals of New York in the case of *Southwick vs. First National Bank*, 84 N. Y., 428, may well be adopted as a summary of the aspect of the instant case:

"This is not a case of mere variance or mere defect, but a failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather ensnare and mislead his adversary."

IV.

The court below erred in refusing to sustain defendants' assignment of error that no sufficient demand for reinvestment was proved to have been made by plaintiffs upon defendants.

The plaintiffs recognized the necessity of a demand by them upon defendants to put the latter in default. In their complaint they alleged that they had made two such demands, one on February 15, 1905, and the other on August 26, 1906 (R., 76). The plaintiffs introduced testimony in regard to an oral demand claimed to have been made in May, 1905 (R., 209-211), and also offered in evidence the written demand—Exhibit K—(R., 172-173, 254). The trial court specifically stated, in its instruction to the jury, that proof of a demand was an essential part of plaintiffs' case (R., 321-322). The jury were told "that if there never was any demand made on the part of the Ryans to be re-invested, and they were satisfied with the situation and allowed matters to go along, then there was no liability on the

part of Tevis and McKittrick to turn over to them the control of the company and reinvest them with the same interest as before" (R., 321), and that the plaintiffs were "not entitled to recover unless they did make that demand within ~~a~~ a reasonable time after the expiration of November, 1904" (R., 322). In fixing the time of the alleged breach of contract as May, 1905 (R., 347), the Supreme Court of Arizona affirmed the trial court's ruling in this regard.

The obligation of defendants was to transfer to plaintiffs certain shares of stock and that obligation could not be converted into a money demand until plaintiffs had made a demand for such transfer and defendants had failed or refused to comply therewith. In *State vs. Mooney*, 65 Mo., 494, the evidence tended to show a contract for the delivery of thirteen and one-half bushels of wheat "when threshed." It was held (p. 496) that to enable the obligee "to recover the value of the wheat in an action against defendant, it was necessary for him to prove a demand made for the wheat before the commencement of his action."

It may be assumed, therefore, that proof of a demand upon defendants for reinvestment was an indispensable element of plaintiffs' case. The question at once arises, however: Was the demand claimed to have been made legally sufficient? It is submitted that the demand relied upon was insufficient, (a) because it was not in proper form; (b) because it was not made at a proper place, and (c) because it was made only upon McKittrick and not upon Tevis also.

(a) The alleged written demand—Exhibit K— (R., 172-173, 254), need not be here considered, because, as the trial court rightly held, "it came too late to be a basis for a claim in this suit" (R., 321). The only other evidence introduced by plaintiffs of a demand occurs in the testimony of Jepp Ryan at page 210 of the record. The witness testified to the making of two alleged demands upon defendants. The testimony as to the first demand is as follows (R., 210):

"A. Along about the two years we notified him—or my lawyer did—that we were ready to comply with the terms of the contract, and I do not think we ever got any reply to it at all.

"Q. What do you mean by that—that you were ready to comply with the terms of the contract?

"A. To pay our part of the judgment that they bought and get the property back.

"Q. Get all the property back?

"A. Our interest—four-sevenths.

"Q. You had made such a proposition?

"A. Yes, sir."

This testimony is somewhat vague and indefinite. The court below in fixing the date of the breach as May, 1905 (R., 347), evidently did not consider the assumed demand above testified to as the basis of this action. Nor could it be so considered. In the first place, it was a mere expression of *willingness* on the part of plaintiffs to pay their part of the Bryant judgment and get four-sevenths of the company's property back. This is obviously not the same as a *demand* for reinvestment. Appropriate words of demand were not used. In the second place, if the formal language were sufficient, the demand was for a return of four-sevenths of the property, and not four-sevenths of the share stock of the company—minus the stock held by plaintiffs—as the contract was construed by the court below to provide.

The testimony of Jepp Ryan as to the demand claimed to have been made in May, 1905, which the court below apparently considered sufficient to put defendants in default, is as follows (R., 210-211):

"A. I told the Captain that we wanted our interest—wanted to know what we were going to get out of it, and he said you will be protected fully—Mr. Tevis will see that you are protected. I said I would like to see Mr. Tevis, and he said I will let you know when you can see him. I said I don't want to start suit, but unless I get some satisfaction I will start suit. He said don't start suit at this time; I will see Mr. Tevis and your interest will be protected."

McKittrick denied that any demand had been made upon him in May, 1905, as testified to by Jepp Ryan (R., 285). But accepting *in toto* the testimony of Jepp Ryan on this point, it is submitted that it does not show that a sufficient demand was made. This assumed demand was more in the nature of a threat of suit than a real demand for reinvestment. The language used could not possibly have given McKittrick the impression that plaintiffs desired an *immediate* return to them of their stock interest in the company. Furthermore, while it does not expressly appear in the testimony that this assumed demand called for a transfer to plaintiffs of an interest in the *company's property*, it is a safe assumption, in the light of the testimony as to the previous demand and the allegations of the complaint, that it did so. For the further reason, therefore, that the demand proved related to the *property and not the stock* of the company it should be held that no sufficient demand here appears, for obviously the tenor of the demand must correspond to the character of the obligation to be performed. An obligation to transfer personal property on demand cannot give the obligee the right to enforce that obligation upon a demand by him for a conveyance of real estate, any more than an obligation to deliver a horse on demand matures upon demand for the delivery of a cow.

As to the form of demand required, 28 *Am. & Eng. Ency. of Law* (2d ed.), 708, states the rule thus:

"Though no technical form of demand is necessary, any language or acts which are understood by the defendant to be a demand on the part of the plaintiff being sufficient, *still there should be a plain and unequivocal request for the present delivery of the property.*"

This quotation occurs, under the subject head "Trove and Conversion," in the discussion of the necessity for demand where a defendant's possession has a lawful inception. But the rule is obviously no different where the action is for

breach of contract, as here, and demand and refusal are essential elements of a plaintiff's right to recovery.

In *Monnot vs. Ibert*, 33 Barb., 24, the plaintiff brought replevin to recover possession of chattels held by defendant. Plaintiff was the mortgagee of the chattels and defendant purchased them from the mortgagor. As showing a demand upon defendant, plaintiff relied upon the following statement made by him to defendant: "I shall have to take them (the chattels) from you, if I cannot get my money any other way." This language was held not to constitute a sufficient demand. The court said (p. 125):

"This expressed a purpose to make a demand in future, and that only in a certain contingency, and not a *plain and unequivocal request for the property, or its delivery there or then.*"

Likewise, in the present case the language relied upon as constituting a demand for reinvestment—"unless I get some satisfaction I will start suit"—indicates rather a purpose to make a demand in the future, in case defendants did not offer plaintiffs some satisfaction, than a purpose to demand present satisfaction. It certainly was not tantamount to "a plain and unequivocal request for the property (stock) or its delivery there or then."

(b) The demand claimed to have been made in May, 1905, was made at an accidental meeting of Jepp Ryan and McKittrick in the Hollenbeck Hotel, Los Angeles. Conceding that the statement of Jepp Ryan relied upon as constituting a demand for reinvestment was sufficient as to form, it is submitted that the demand was not made at a proper place. The rule of law in this regard is that the demand "should be made in such a manner as to allow the person in possession *immediately* to comply therewith," and hence "should, as a rule, be made at the place where the chattel is deposited" (28 *Am. & Eng. Ency. of Law* (2d ed.), 707).

In *Hamilton vs. Calhoun*, 2 Watts (Pa.), 139, 140, the applicable rule was stated as follows:

“There is a difference between a contract for the payment of money and the delivery of specific articles. In a contract for the payment of money, the place of payment is not material; the money is supposed to be with the debtor wherever he may be, and therefore when a demand of money is necessary, it may be made at any place. Not so with specific articles which cannot attend the person of the debtor; they are supposed to be at the debtor's place of residence, and a creditor must there demand the payment.”

The assumed demand here was not made at McKittrick's place of residence. The offices and residences of defendants were in Bakersfield, California, an entirely different city from that in which the demand was made. The plaintiffs knew this. To make a demand in such a way that defendants could perform their obligation under the contract, the Ryans should have demanded the transfer of the stock at the offices of the corporation in Bakersfield, where McKittrick and Tevis might be found and could have made such transfer, or at the individual places of business of the defendants, or if defendants could not be found at either of the former places, demand should have been made at defendants' residences. Can it be presumed that McKittrick carried with him wherever he went, ready for any accidental meeting with one of the plaintiffs, stock certificates valued, as plaintiffs claim, at many thousands of dollars, prepared to transfer the same to one of the plaintiffs? Surely the defendants had a right to assume that plaintiffs would come to them at a proper place to demand a reinvestment of their (plaintiffs') stock interest in the company before such demand for stock certificates could be converted into a money claim. It is absurd to suppose that this could be done at an accidental meeting in a strange city, in the “back room” of a hotel. The defendants had regular offices at Bakersfield, California,

as plaintiffs knew. There the transfer of stock to which plaintiffs were entitled, if defendants had breached the contract, could be effected. There Tevis and McKittrick could be found, and only that was, under the circumstances of this case, a proper place to demand performance.

(c) But the total insufficiency of the assumed demand in May, 1905, becomes apparent when it is remembered that no demand was proved to have been made upon defendant Tevis. Unless, therefore, the demand upon McKittrick was in law a demand upon Tevis as well, the joint judgments entered by the trial court and by the Supreme Court of Arizona (R., 100, 368) cannot be sustained. That demand could obviously be legally effective as to Tevis only if the obligation of Tevis and McKittrick under the contract was a joint one. It is submitted that the obligation of Tevis and McKittrick to reinvest plaintiffs was not joint, and that hence a demand for reinvestment upon McKittrick was not sufficient to put Tevis in default.

It is important to note that the reinvestment clause of the contract is not joint in form. Tevis and McKittrick do not there say: We agree to reinvest the parties of the second part, etc. The language is in the passive form, "*The interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.*" It requires a construction of his language in the light of the reorganization scheme outlined in the contract to determine whether the obligation which the law thereby imposed upon defendants was a joint or several one. The court below held that the defendants were obligated by the contract to transfer to plaintiffs 291,928 shares of stock which with the 297,500 shares issued to the plaintiffs—139,750 to T. C. Ryan, 69,875 to E. B. Ryan, and 69,875 to Jepp Ryan (R., 122)—would make four-sevenths of the total share stock of the company. Under the contract defendants were to have 280,500 shares of the company's stock. 140,100 shares of

this stock were issued to Tevis and the same number of shares to McKittrick. The remaining 300 shares necessary to make up defendants' full quota of 280,500 shares were issued to W. R. Shafter, Frank S. Rice, and Clinton E. Worden in blocks of 100 shares each, apparently to qualify them to become directors of the reorganized company (R., 122). The trust stock provided for in the contract in the amount of 200,000 shares was issued to McKittrick as trustee (R., 122). In other words Tevis held legal title to 140,100 shares and McKittrick to 340,100 shares. Hence the interest to be retransferred by Tevis to the Ryans was not coextensive with that of McKittrick. The obligation of Tevis under the contract to reinvest the plaintiffs with their stock interest in the company could not be greater than to require the return by him to the plaintiffs of all the stock he received under the contract, namely 140,100 shares. Suppose Tevis had retransferred to the Ryans these 140,100 shares, received by him under the contract, would not his liability on the contract have been thereby discharged? We submit that it would have been. It is as if defendants had agreed to transfer 291,928 shares of stock to plaintiffs, 140,100 to be transferred by Tevis and the remaining 151,828 shares to be transferred by McKittrick. Such an undertaking though joint in form is several in fact because the acts to be performed by each of the quasi co-obligors are not the same, as must be the case in all true joint contracts. 1 *Addison on Contracts* (8th ed.), 30, states the rule pertinent here as follows:

"When the parties engage for the performance of distinct and several duties, mere words of plurality, such as 'we bind ourselves,' will not make the contract joint."

Even admitting that Tevis was responsible for the entire 280,500 shares which the contract provided should be issued to defendants, he could not be held liable for the remaining 11,428 shares, the difference between the 291,928 shares to

which the court below held plaintiffs entitled and the 280,500 allotted to defendants by the contract. This demonstrates further that the obligation of defendants to reinvest plaintiffs with certain shares of stock was not joint, but several, and from this it follows necessarily that a demand upon each defendant was essential to put both in default. It will not do to say that had a demand been made upon Tevis by plaintiffs he would have refused to transfer his interest to plaintiffs because McKittrick, whose interest and obligation were different, failed to comply with plaintiffs' demand. Tevis had a right to discharge his obligation by transferring his interest to plaintiffs upon demand, and he has a right to insist that such demand should have been made upon him, unless it be proved, as it was not proved here, that his own conduct showed that a demand would have been utterly useless.

If in an obligation joint in form A and B agree to deliver to C fifteen horses upon demand, A five and B ten, it is obvious that this obligation is in fact several, and that a demand upon B alone for the performance of the contract will not put A in default as to the five horses agreed to be delivered by him. It cannot be said that, because B refused or neglected to deliver the ten horses he agreed to deliver, A would also, had a demand been made upon him, have refused or neglected the performance of his obligation under the contract. This is precisely the situation in the case at bar, and demonstrates, we submit, the insufficiency of the demand proved to have been made.

V.

The court below erred in holding that the plaintiffs were entitled to recover the value of four-sevenths of the stock of the company less the 279,500 shares retained by them, namely, the value of 291,928 shares, which, computed on the basis of the verdict of the jury, was \$67,435.67.

The verdict of the jury, under the trial court's instructions, was for \$132,000, and for this amount the trial court gave judgment against defendants (R., 97). The Supreme Court of Arizona, however, directed the entry of a remittitur by plaintiffs of \$64,564.63, otherwise the judgment of the trial court to be reversed and the case remanded for a new trial (R., 350). The plaintiffs filed the remittitur and the court gave judgment against the defendants for \$67,435.67 (R., 361-362, 365). A rehearing was had in that court to determine the propriety of the affirmance on condition of the filing of the remittitur by plaintiffs, but the court refused to change its judgment theretofore entered in the case (R., 351-368). In sustaining the trial court on condition of the filing of the remittitur in the sum mentioned the court below held that the trial court's instruction on the measure of damages was correct, except for the fact that it did not direct the jury to deduct from the amount found by them as four-sevenths of the net value of the company's assets, the value of the 279,500 shares allotted to plaintiffs under the contract. Assuming, therefore, that the jury's verdict of \$132,000 was four-sevenths of the total net worth of the company, the court reasoned that such total worth of the company must be \$231,000 and that this latter sum was the exact equivalent of the value of the entire share stock of the company; the court then found that four-sevenths of the total share stock of the company minus the 279,500 shares held by

plaintiffs was 291,928 shares, and that since the entire share stock of the company, consisting of 1,000,000 shares, was worth \$231,000, 291,928 shares must be worth $291,928 \div 1,000,000 \times \$231,000$, or \$67,435.37. To this sum the court held plaintiffs entitled and accordingly directed remittitur of \$64,564.63, the difference between \$132,000 and the assumed value of the 291,928 shares which the court decided defendants were obligated to transfer to plaintiffs.

The requirement that a remittitur be filed by plaintiffs as a condition of the affirmance of the trial court's judgment was based upon paragraph 1588 of the Revised Statutes of Arizona, 1901, and the case of *Kennon vs. Gilmer*, 131 U. S., 22. The paragraph of the Revised Statutes provides so far as material here:

"If in any judgment rendered in the district court there shall be an excess of damages rendered, and before the plaintiff has entered a release of the same in such court in the manner provided by law, such judgment shall be removed to the Supreme Court, it shall be lawful for the party in whose favor such excess of damages has been rendered, to make such release in the Supreme Court in the same manner as such release is required to be made in the district court; and upon such release being filed in said Supreme Court, the said court, after revising said judgment, shall proceed to give such judgment as the court below ought to have given if the release had been made and filed therein."

But the provisions of the paragraph are limited by paragraph 1591, which reads:

"When the judgment or decree of the court below shall be reversed, the Supreme Court shall proceed to render such judgment as the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damages to be assessed, or the matter to be decreed is uncertain, in either of which cases the case shall be remanded for a new trial in the court below."

The latter paragraph is, in effect, in accord with the common-law rule that a remittitur is proper only in cases "where the amount of the excess is apparent or is readily ascertainable" (18 *Encyc. Pl. & Pr.*, 128).

In re Holmes, 79 Ill. App., 59, is a good illustration of the necessity that the amount of the excessiveness of the jury's verdict should be apparent to justify a remittitur by the prevailing party. The court there, reversing the ruling of the trial court requiring a remittitur, said:

"If the court was of opinion, as it stated on the hearing of the motion for new trial, 'that for the alleged improper remark of plaintiffs' counsel to the jury said verdict should be reduced to \$400,' then a new trial should have been granted, for it seems impossible that the learned trial judge could have determined to what extent the verdict was induced by counsel's remarks."

Obviously the excess in the jury's verdict is not apparent in a case where improper evidence is put before the jury and where the jury's verdict was reached under an erroneous instruction. In the instant case, as has been shown, evidence imputing fraud to defendants, increasing defendants' obligation under the written contract; evidence of defendants' alleged fraudulent conduct subsequent to the date of the alleged breach of contract, at which time plaintiffs' rights became fixed, and evidence consisting of self-serving declarations made by plaintiffs long after the controversy between the parties arose was placed before the jury. This evidence was not only legally inadmissible, but tended to arouse the passions of the jury and to prejudice them against the defendants. In addition to this the court erroneously instructed the jury on the measure of damages. Can it be said, in the light of these errors of law, that the amount of the excessiveness of the jury's verdict may be clearly segregated from the entire amount awarded?

It is submitted that a remittitur will not cure (a) a ruling admitting improper evidence; (b) a verdict tainted by passion and prejudice, and (c) an erroneous instruction on the measures of damages. The present case has all these vices.

(a) In the course of the argument on the first point herein (see *supra*, pp. 42-43) cases were cited and discussed which hold that the erroneous admission of improper evidence cannot be cured by the filing of a remittitur, and nothing further need be added here in this regard.

(b) That a verdict tainted by passion and prejudice cannot be cured by a remittitur of any supposed excess is held by the following cases and authorities:

18 *Encyc. Pl. & Pr.*, 144.

Stafford vs. Pawtucket Haircloth Co., 2 Cliff., 82;

22 Fed. Cas., 1032.

Southern Pacific Co. vs. Tomlinson, 4 Ariz., 126; 33 Pac., 710.

Drumm vs. Cessnum, 58 Kans., 331; 49 Pac., 78.

Atchison vs. Plunkett, 61 Kans., 297; 59 Pac., 646.

In *Stafford vs. Pawtucket Haircloth Co.*, *supra*, Mr. Justice Clifford used this language, which this court quoted with approval in *Arkansas Cattle Co. vs. Mann*, 130 U. S., 69, 75:

"Where the circumstances clearly indicate that the jury were influenced by prejudice or by a reckless disregard of the instructions of the court that remedy (remittitur) cannot be allowed. Where such motives or influence appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding."

In *Southern Pacific Co. vs. Tomlinson*, *supra* (p. 711), the court below said:

"Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a

remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of damages awarded, but to the whole case, to determine the existence of passion or prejudice and to determine how far such passion or prejudice may have operated in influencing the finding of *any* verdict against the defendant."

In *Drumm vs. Cessnum*, *supra*, it was pertinently said by the Supreme Court of Kansas (p. 79):

"We know of no rule by which the court can determine that a part of a single award of damages is excessive, and the result of prejudice, while the remainder is untainted."

These cases suffice to show the applicable rule as to the impossibility of rectifying a verdict resulting from passion and prejudice by the remittitur of any part thereof. That the evidence in this case erroneously allowed to go to the jury aroused the passions and prejudices of the jury to the defendants' detriment has been shown elsewhere.⁴

(c) In support of the proposition that an erroneous instruction on the measure of damages is not obviated by a remittitur of an amount assumed to represent the excessiveness of the jury's verdict we cite the following:

Jacoby vs. Johnson, 56 C. C. A., 637; 120 Fed. Rep., 487.

Reed vs. Keith, 99 Wis., 672; 75 N. W., 392.

Lauth vs. Chicago Union Traction Co., 244 Ill., 244; 91 N. E., 431.

Hughes vs. Chicago, R. I. & P. R. Co., 150 Iowa, 232; 129 N. W., 956.

In *Jacoby vs. Johnson*, *supra*, the action was in tort for cutting down the plaintiff's signs. The trial court gave an inadequate instruction on the measure of damages, and later

sought to rectify the jury's verdict based thereon by requiring a remittitur in lieu of a new trial. This was held to be error, the Circuit Court of Appeals saying (p. 488):

"Undoubtedly, where the jury, after being properly instructed by the court, return an excessive verdict, the court, in the exercise of its judicial discretion, may make a conditional order granting a new trial unless the plaintiff remits the excess. In such case however, it is the error of the jury that is corrected; and, as the plaintiff voluntarily remits the excess, the defendant is not injured by a judgment for the reduced amount, and has no just cause to complain. But where, in an action of tort, there is error in the instructions of the court, which may have caused the jury to render a verdict against the defendant for damages in an amount greater than is justifiable, the only mode in which the court can rectify its error is by granting a new trial. In such instance the court cannot substitute its own estimate of the damages the plaintiff ought to have recovered for the sum found by the jury. The defendant is entitled to have the damages assessed by a jury under proper instructions by the court. Of this right the defendant cannot be deprived without his own consent. This, it will be noted, was not a case in which the damages were apportionable by anything appearing of record. The verdict was a general one, the jury finding a lump sum for the wrongs complained of in the several counts of the declaration."

This, it is true, was said of an action of tort, and not of contract; but this difference does not make the court's ruling inapplicable to actions of contract where, as here, the jury's verdict is not apportionable, and it is impossible to estimate with any precision the extent to which the inadequate instruction enhanced the verdict.

The Supreme Court of Illinois well said in *Lauth vs. Chicago Union Traction Co.*, *supra*, reversing 146 Ill. App., 584, for the admission of incompetent testimony, where there had been a remittitur in the appellate court:

"Where an error has been committed as to some substantive fact which bears upon the right of recovery or the measure of damages in respect to some matter which is not susceptible of computation, a remittitur will not cure it."

Conceding now for purposes of argument that the court below was right in ruling that the errors of the trial court could be cured by a remittitur, was the remittitur required by the court sufficient to cure the erroneous verdict? This remittitur accounts only for the 279,500 shares of stock allotted to plaintiffs under the contract. But should not the 200,000 shares of trust stock to which McKittrick had legal title and the 240,000 shares of treasury stock, the legal title to which was in the company, and over which defendants had no control or disposition, except in their capacity as directors of the company, have been deducted from the share stock of the company of 1,000,000 shares, and the plaintiffs allowed the value of four-sevenths of the difference, less the 279,500 shares held by plaintiffs? As to the 200,000 shares of trust stock, Tevis had absolutely no legal control thereover, and could not transfer title thereto; and the rights of plaintiffs, as *cestuis que trustent*, against McKittrick, the trustee clothed with legal title to this stock, could be worked out only in a court of equity, and could not be adjusted in this action at law for breach of contract. The 240,000 shares of treasury stock were the property of the corporation, and their transfer by defendants to plaintiffs would have been a breach of duty by defendants as fiduciaries just as much as would the conveyance of the company's real property have been such a breach. The court below held that if the contract here sued on were construed to relate to the company's mines and to impose upon defendants an obligation to convey to plaintiffs a four-sevenths interest therein, it would have been an undertaking by defendants to breach their duty as directors of the company, and it was especially in view of this that the court construed the contract as relating to the share stock and not the mines of the company

(R., 345). Likewise the contract should not be construed so as to require defendants to transfer to plaintiffs the personal property of the company, which equally with a conveyance of the company's real property would involve defendants in a breach of duty as directors of the company, or, as the court below expressed it, would put defendants "in a position where their pecuniary interest would clash with their duties"

Following out the line of argument here suggested, and assuming that the court below ruled correctly in all other respects, the plaintiffs would appear to be entitled to four-sevenths of [1,000,000 shares minus (200,000 shares plus 240,000 shares)] minus 279,500 shares, which equals 40,500 shares of stock. The value of these shares, on the value basis used by the court below, is $40,500/1,000,000$ of \$231,000, which equals \$9,355.50. This it is submitted, is the maximum which, under any view of the case, the plaintiffs are entitled to recover in this action. In addition, as has been suggested, plaintiffs would be entitled to go into equity and secure an accounting for their portion of the trust stock of 200,000 shares, legal title to which was vested in McKittrick individually.

Defendants submit in conclusion that an examination of the entire record in the case shows that the judgments entered against them in the trial court and the court below are unconscionable in the extreme and that the errors of law committed by the trial court and not corrected by the court below require the reversal of the judgment of the latter court and the awarding of a *venire de novo*.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1943

No. 192

WILLIAM C. DEVIS, WILLIAM
H. GILBERTSON, THE PACIFIC
FIDELITY COMPANY,
AND THE UNITED STATES
SURETY COMPANY,

Plaintiffs in Error

JEFF RYAN, THOMAS O.
RYAN, AND E. B. RYAN,

Defendants in Error

In Error to the Supreme Court of the Territory of Arizona.

BRIEF FOR DEFENDANTS IN ERROR

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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1913.

WILLIAM S. TEVIS, WILLIAM
H. MCKITTRICK, THE PA-
CIFIC SURETY COMPANY,
AND THE UNITED STATES
SURETY COMPANY,

Plaintiffs in Error,

vs.

JEPP RYAN, THOMAS C.
RYAN AND E. B. RYAN,

Defendants in Error.

In Error to the Supreme Court of the Territory of Arizona.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The defendants in error were the plaintiffs in the District Court. The cause was tried to a jury and resulted in a verdict for the plaintiffs in the sum of \$132,000.00 upon which judgment was duly entered in the District Court on December 21st, 1908. Upon appeal the terri-

territorial Supreme Court rendered judgment ordering that should the appellees (the plaintiffs in the court below) elect to file a remittitur in the amount of \$64,564.63 judgment should be entered in favor of such appellees and against the appellant and sureties upon the bond on appeal, and against the Pacific Surety Company, surety upon a bond given in the court below to release an attachment, in the sum of \$67,435.37, and ordering that otherwise the judgment of the District Court should be reversed and the cause remanded for a new trial.

Both parties filed in the territorial Supreme Court a petition for a rehearing, which petitions are in the nature of briefs and appear at pages 350 to 361 of the record.

After a consideration of the argument upon such rehearing and on March 25th, 1911, the court rendered its decision and judgment adhering to the views expressed in its former opinion.

On the 27th of the same month the appellees in said court, plaintiffs in the district court, filed their remittitur in pursuance of such decision and judgment. On the 10th day of November, 1911, the court rendered a final judgment in favor of the appellees and against the appellants in the sum of \$67,435.39.

On the third of January, 1912, the appellants filed their petition that a writ of error issue out of this court to the territorial supreme court, which was on said day duly allowed.

The parties on this record will hereafter be referred to as defendants and plaintiffs, respectively.

It will be noted that on the 9th of November, 1911, nearly eight months after the plaintiffs filed their remittitur in the sum of \$64,564.63, one of the attorneys for the

defendants, appeared before the Supreme Court, and, without notice, moved that court to enter final judgment in the cause, and that upon the following day judgment was entered (R. pp. 367-8.)

The judgment is for the sum of \$67,435.39, the exact difference between the amount of the judgment entered in the District Court and the sum remitted, and there is no provision in it with respect to interest.

It does not appear that a copy of this judgment was ever served upon the attorneys for the plaintiffs. We believe that its entry was superfluous and unnecessary. Upon its face the plaintiffs lose interest for nearly three years.

It is obvious that the provision for interest was omitted inadvertently by the court and by the attorney for the defendants who prepared the judgment and submitted it for signature to the Justice of the Supreme Court who signed it.

As a matter of fact the attorneys for the plaintiff had no knowledge or information with respect to the entry of such judgment or as to such omission until the writer of this brief saw it when he examined the transcript in the preparation of this brief.

The cause was tried upon a third amended and supplemental complaint which contained three counts.

A demurrer was sustained to the first two counts. The trial therefore was had upon the third count. Such third count appears at pages 70 to 77 of the record.

It refers to and adopts the first five paragraphs of the first count which appear at pages 62 to 64 of the record.

Upon the motion of the defendants, all that portion of the second paragraph of such third count, consisting of

the last four lines of page 70 of the record and all of page 71 were stricken out. (Record page 326.)

The court denied defendants' motion to strike out certain other portions of the complaint; but the defendants have assigned as error neither such ruling of the court nor the admission of any evidence relating to the allegations which they moved to strike out.

Under the Arizona statute the assignments of error to the Territorial Supreme Court are not a separate document filed with the court, but are a part of appellant's opening brief.

Since obtaining a copy of appellants' brief in this court we have filed our Praecipe with the State Supreme Court, directing that all of appellants' briefs in the Territorial Supreme Court upon the main appeal and upon the motion for a rehearing be transmitted to this court. Our purpose in so doing was to have before this court the defendants' assignments of error in the Territorial Supreme Court, and to establish that at least one material point now urged by the defendants was not presented to the Territorial Supreme Court.

Four-sevenths of its capital stock was owned by the plaintiffs and three-sevenths by the defendants.

The operations of the corporation had been conducted in an informal way. Pablo Soto, a merchant at Wilcox (R. p. 229), honored checks drawn upon his firm at Pearce, Arizona, for the amounts due for labor and at the end of each month paid the foreman what additional money was required. (R. pp. 231, 232). Soto, in turn, would, at stated periods, make an assessment on the stockholders in proportion to their stock holdings. In this way \$160,000 had been expended, of which sum the defendants had con-

tributed three-sevenths by meeting such assessments of Soto, and the plaintiffs four-sevenths. No notes of the corporation were issued for these amounts, and it does not appear from the books of the corporation that such advances were treated as debts. They were mere voluntary contributions.

Prior to July, 1902, one Bryant obtained a judgment against the corporation for about \$23,000 and issued execution upon it. Jepp Ryan before the execution arranged with one McPherson, a banker at Omaha, for the advance by McPherson of sufficient funds to bid the property in at such sale.

The nature of this arrangement was testified to by both Ryan and McPherson. McPherson testified:

"As an inducement for me to purchase said mines at sheriff's sale, he (Jepp Ryan), said that the properties could be purchased at sheriff's sale at a cost not to exceed \$25,000 and that when the time to redeem would pass, he would organize a corporation and sell a sufficient amount of stock therein to repay me the money invested, and that if I would advance this money he would divide the balance of the stock with me, share and share alike. The title was to be lodged in me until such time as the corporation above mentioned could be organized and stock sold to reimburse me."
(R. p. 105.)

Ryan's testimony is substantially to the same effect.
(R. p. 202.)

In pursuance of this arrangement, on the 31st of July, 1902, the property was bid in at the sheriff's sale by one Neale, acting on behalf of McPherson, for something over \$23,000.

Such were the conditions on the 29th of November, 1902, when McKittrick met the Ryans at Wilcox to attend

the annual stockholders' meeting of the corporation. The time to redeem from the sheriff's sale would expire on the 31st of January, 1903. The Ryans were absolutely protected whether the property was redeemed from the sale or not. On the other hand, the share of Tevis and McKittrick was in jeopardy; unless the property should be redeemed their interest would be irretrievably lost.

As to the conversation between Jepp Ryan and the defendant Captain McKittrick which led up to the contract Jepp Ryan testified:

"I asked the Captain what he intended to do with the mining proposition and he says, 'Don't know that we have anything to do with it; you have us frozen out.' I said, it is not our intention to freeze anyone out. You put your money in in good faith and we are willing to go in with you and make any kind of a reasonable deal to protect each interest." (R. p. 203.)

E. B. Ryan testified:

"Jepp Ryan asked Captain McKittrick what he intended to do about the mining property; the Captain said that he had nothing to do, they were out; that we had the advantage of them and could freeze them out; that McPherson held the property in his name practically. So then we told him there was no freeze out at all, that we wanted to do whatever was fair and square to protect everybody so we could all get our money back." (R. p. 227.)

Thomas C. Ryan testified to the same effect. (R. p. 216.)

The contract in question was the result of these conditions and of the disinclination of the Ryans to freeze Tevis and McKittrick out.

Tevis was a man of great wealth; he was unwilling to take active hold of an enterprise unless he had control of it. The Ryans were willing to surrender control pro-

vided they had some assurance that they would get back the money which they had invested, to-wit, their four-sevenths of the \$160,000. McKittrick was unwilling to agree positively that the Ryans should get back this money.

The first agreement drawn by the Ryans—and it was not signed—evidently comprised an agreement on the part of Tevis and McKittrick that under their operation of the company, the Ryans should get back the money which they had invested. This, McKittrick was unwilling to agree to. He said that such a contract was “too much like a promissory note” (R. p. 204), and it was rejected. Thereupon and under these circumstances and conditions the agreement attached to the complaint was executed.

The tenor of this contract cannot be better stated than in the language employed by the court in denying defendants’ motion for an instructed verdict at the close of plaintiff’s case:

“Of course the court has no right to read into the contract any terms or stipulations not there, but it is the duty of the court in interpreting the contract to take the whole contract into consideration, and as I view the whole contract upon further examination of it, it seems to me that the intent of the parties, and as may be fairly gathered from the terms of the contract, is this: That Tevis and McKittrick should be put in full control of the management and operation of the company and for that purpose they were given what they did not theretofore have—a majority of the stock. They were given the Board of Directors and in return for that they were to do certain things, viz.—they were to sell the treasury stock at such price as the Board of Directors might specify and apply the proceeds to paying off the McPherson judgment and the balance up to—(whatever the amount was)—for the

management and operation of the property; that they were, as well as the plaintiffs in the case, to do what they could to sell the trustee's stock. Now, there was no obligation on the part of Tevis and McKittrick to do these things. In other words, there was no obligation that any failure of it would cause any liability on their part pecuniary, or otherwise, but the contract did provide that if they were unable to do these things within the space of two years, then the plaintiffs would have the right to be put back in the position they were in before the contract was entered into. Now, I think a fair construction of the terms of the contract bears that out. But there was no breach of this contract on the part of Tevis and McKittrick until two things had happened: First—A failure to do the things contemplated by the contract within two years. And, second—A demand on the part of the plaintiffs to be reinvested.

“The breach of the contract came when a demand was made by the plaintiffs to be reinvested with their original interest, and the failure on the part of Tevis and McKittrick to do so. That was the breach. The failure was a failure to carry out the scheme of this contract within two years; the general scheme of the contract being to pay off the McPherson judgment and to sell the trustee's stock.
 * * * It seems to me that the terms of the contract
 * * * provide for a general scheme whereby the company was to be put on its feet and the indebtedness paid off and the original amount put in by both parties to be paid off from the sale of the other stock. * * * Now, if there has been a failure on the part of Tevis and McKittrick to carry out the scheme within two years, then the plaintiffs have a right to be reinvested, but there was no breach until they refused plaintiffs' demand to be reinvested with **their** original holdings. The contract seems to

bear out that interpretation if you read it as an entirety and take into consideration, as I think I have a right to do in considering a contract, the situation of the parties at the time the contract was entered into. 'The parties of the first part,' that is, Tevis and McKittrick, 'shall have the term of two years in which to comply with all the requirements of this contract.' Now, that does not mean the sale of the treasury stock at such price as the Board of Directors might authorize; it must have meant more than that. 'Should they fail or refuse to comply with all the agreements or stipulations herein mentioned' * * *, of course, if you take the words 'agreements and stipulations' and construe it strictly, there is no specific agreement on the part of Tevis and McKittrick to do any one particular thing except to sell at such price as the Board of Directors might specify; but I think that means, and must be construed to mean—reading the contract all together, a failure to carry out within two years, the general scheme of the contract. In that case the agreement shall be null and void. 'Should this agreement be annulled by any failure of the parties of the first part to do any and all things herein required of them'—I do not find any difficulty in construing the word 'required,' in the light of the circumstances, to mean the general scheme of paying off this indebtedness and putting the company on its feet. The words 'of them' throw some weight toward the construction placed on it by the defendants because if we construe it strictly it means simply to sell treasury stock at the price authorized by the Board of Directors. But I cannot believe that it was the intention of the parties, or the intention of the expression of the contract, to limit the requirements on the part of Tevis and McKittrick to the sale of treasury stock at the price the directors—their directors—might fix within two years. I think a fair construction

of the terms of the contract is, as I have stated, that within two years a certain scheme was to be carried out and if it was not done within two years, then the plaintiff had a right to be reinvested and a breach would come on the refusal of Tevis and McKittrick to reinvest them." (R. pp. 255, 258.)

In pursuance of this contract the management and the books of the corporation were turned over to the defendants. Its office was established at Bakersfield, California, the residence of the defendants.

At the time of the execution of the contract there were five directors, consisting of the plaintiffs and the defendants.

On the 26th of January, 1903, a special stockholders' meeting was held at Bakersfield, which was attended by the defendants personally, and at which the stock of the Ryans was voted by McKittrick, proxy.

The resignations of the Ryans as directors were accepted and three other persons, Shafter, Worden and Rice, were elected in their stead. Shafter and Worden each owned 100 shares of the stock, and Rice 78. (Transcript 175-6.)

It is conceded that these three directors served at the request and for the convenience of the defendants. (R. p. 297.)

The articles of incorporation were amended as provided in the contract, 240,000 shares of stock were put into the treasury, 279,500 were issued to the plaintiffs, 280,500 were issued to the defendants and 200,000 were issued to McKittrick as trustee, to be sold as provided in the contract, at not less than par; the proceeds of the sales to be divided pro rata among the parties to the contract until they should have been fully reimbursed for the \$160,-

000, which they had expended upon the property. The remaining shares were after such reimbursement, to be divided equally among the parties in the ratio of 101,000 shares to the defendants and 99,000 to the plaintiffs. The contract provided that the 240,000 shares of stock put into the treasury should be "sold in whole or in part by the said parties of the first part (defendants), at such price or prices as the Board of Directors of said corporation may deem advisable and the money raised from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson of Omaha, Nebraska, or his assigns, against the said corporation in the amount of about \$25,532.47. Second, to use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this company."

One of the provisions of the contract was as follows:

"The parties of the second part (the plaintiffs), shall not be liable for any expense connected with the operation of this company excepting the expense of selling the stock held in trust for the parties hereto."

It will be noted that nothing was said in the contract with respect to the incurring of indebtedness by the corporation; that it had been operated just as if it had been a co-partnership consisting of two parties, one of the parties being the plaintiffs and the other the defendants.

We call attention to the last quoted clause of the contract as tending to establish, as we shall at the proper time argue, a contractual obligation upon the part of the defendants to keep the corporation free from debt. At the outset the defendants seemed to appreciate this; for when confronted with the impracticability of selling sufficient treasury stock to pay the McPherson indebtedness before

the period of redemption should lapse, they, procured the plaintiffs to sign the minutes of the special stockholders' meeting ratifying the incurring of an indebtedness to the defendant Tevis of \$30,000. Tevis loaned the \$30,000 to the company and took its promissory note for it.

The minutes of the stockholders' meeting show that the resolution of ratification provided:

"It is further ordered that the said promissory note together with the interest thereon, shall be paid out of the first moneys arising from the sales of the 240,000 shares of the treasury stock of said corporation."

The transaction to which the Ryans had thus assented was, in effect, a modification of the contract whereby it was provided that the proceeds of the sale of the treasury stock should be applied first, to pay off the defendants' loan, which had thus been substituted for the McPherson judgment. This assent of the plaintiffs was their last act in connection with the affairs of the corporation. From that time on the defendants assumed, as under the contract was their right, its entire management; and it will appear that their act in requesting the Ryans to assent to this loan was their last act in recognition of their contractual obligations. From this time on they ignored the contract as if it had not existed.

There is no dispute as to any facts except as to the conversations which took place between the defendant McKittrick and the plaintiffs immediately prior to the execution of the contract and bearing upon the question of demand.

It is the contention of the plaintiffs and is alleged in the complaint that the defendants deliberately and in viola-

tion of their contractual obligations so managed the company as to divest it of all of its property and to secure it for themselves.

The facts tending to indicate such purpose on their part are, as has been stated, undisputed, and the only contention with respect to the existence or non-existence of such purpose is as to the proper inference to be drawn from the facts.

Shortly after the execution of the contract 32,000 shares of the treasury stock were sold at twenty-five cents per share, and just prior to the expiration of the two years when it would become the defendants' duty to reinvest the plaintiffs, the remaining 208,000 shares of treasury stock were sold for three-quarters of a cent a share. No part of the \$9,500 proceeds of such sales of treasury stock was applied toward the payment of either interest or principal of the note.

On the 12th day of December, 1904, as appears by the minutes of the Board of Directors of that date, they authorized a further loan of \$3,000 from the Western Company with which to pay \$430 to the land office for patents, to pay \$200 lawyers' fees, and to purchase other claims, although at this time they had sold the stock of the company for three-fourths of a cent a share, which, according to McKittrick (R. p. 131), was its actual value, and had been unable to raise any funds for the purposes of the corporation.

There was testimony that the plaintiffs made a written and oral demand upon the defendants for the re-investment of their interest between the months of February and May, 1905. This is controverted by the testimony of the defendants. This was one of the issues submitted by the court to the jury. A written demand (being Exhibit K),

was made upon the defendants. The date does not appear. Its recitals show that it must have been made after July 11, 1906, which was the date of the Sheriff's deed to the Western Company, to which the demand refers.

Tevis transferred his \$30,000 note to the Western Company, a corporation which he had procured to be incorporated for the purpose of holding funds which he had from time to time given to his wife and children. He testified that his children were all minors and had no guardian other than himself.

On the 28th of April, 1905, the Western Company brought suit against the Turquoise Company in the Superior Court of Kern County, California, and judgment by default for Forty-four odd thousand dollars was entered thereupon on the 24th of May, 1905. On the 12th of June, 1905, McKittrick made a written demand upon the Turquoise Company for \$9,975.00 back salary. After writing this letter McKittrick went to Tombstone, Arizona, with a certified copy of the judgment and there procured two actions to be instituted.

On the 20th of June, 1905, McKittrick brought action against the Turquoise Company in the District Court of Cochise county, Arizona, one by the Western Company upon its judgment and the other by himself upon his claim for back salary. The attorney for the plaintiff in both of such suits was H. L. Pickett, who, it is admitted, was of the firm of Bowman & Pickett, who had been the regularly retained attorneys of the company. In both actions judgments were entered by default on the 20th of July, 1905.

At no time had the board of directors authorized the payment of any salary to McKittrick for his services.

On the 21st of August, 1905, a meeting of the directors of the company was held at Bakersfield, which was attended by the two defendants and Rice. At this meeting, held after the judgment, a resolution was passed, McKittrick voting for it, whereby it was provided that the sum of \$250 per month from January 26th, 1903, be allowed to McKittrick as general manager and secretary of the company. McKittrick's presence and vote were necessary to constitute a quorum and to pass the resolution.

Both McKittrick and Tevis testify that they had nothing to do with the bringing of the suit by the Western Company against the Turquoise Company in the Superior Court of Kern County.

On direct examination Tevis testified:

"The note was subsequently sued on by the Western Company. I had nothing to do with the suit. It was brought by the management of the Western Company. * * * I had nothing whatever to do with either of the suits nor the execution sale under the judgment; no interest in the Western Company; am not an officer of the company." (R. p. 303.)

On cross-examination he testified:

"The \$30,000.00 I loaned to the Turquoise Company was some money that was inherited from my mother's estate and belonged to my children and as I had incorporated the Western Company to hold the funds that I had from time to time given my children and wife, I naturally intended to put that money, and had put the money, and considered it to belong to the Western Company because it was the holding company for the children. My children are minors. They have no other guardian than myself." (R. p. 307.)

The testimony of Tevis that he had nothing to do with the suit in the light of these facts, is simply incredible. It is difficult to believe that the officers of the Western

Company would have sued and sold out a corporation in which Tevis was largely interested without his consent and procurement.

McKittrick, having obtained his judgment, sold it to the Western Company and received the full amount of it from the Western Company. (R. p. 293.)

On the 11th of July, 1906, the sheriff of Cochise county in pursuance of an execution sale conveyed all of the mines mentioned in the complaint to the Western Company. On the 18th of July, 1906, the Tejon Mining Company was incorporated by Tevis, McKittrick, Rice and two others, and that corporation has since that time operated the mines.

On the 21st day of August, 1905, at the same meeting in which the back salary was voted to McKittrick, a resolution was passed directing a private sale of all the personal property of the company, and on July 17, 1906, it appears that all of such personal property was sold to H. B. Chase. (R. p. 141.)

This personal property was sold by Chase to McKittrick (R. p. 286). It appears, by the testimony of the witnesses Reynard and Taylor that the business in behalf of the mining properties mentioned in the complaint, has been continuously conducted with McKittrick. (R. pp. 241-243.)

It appears therefore that all of the property of the Turquoise Company passed from its ownership to that of Tevis and McKittrick or of a corporation organized and owned or controlled by them.

It is alleged in the complaint, that these various acts of the defendants were done with the purpose, intent and design to defraud the plaintiffs of their property.

No motion was made by the defendants to require the plaintiffs to separately state any different causes of action that might be stated therein, nor did the defendants demur on the ground that an action *ex contractu* and an action *ex delicto* had been improperly joined.

Upon the entire facts as set forth in the complaint, the defendants simply joined issue, and trial was had accordingly.

The value of the mines owned by the Turquoise Company at the time of the demand made by the appellees for investment was \$270,000.00. This fact is foreclosed by the verdict. A number of witnesses testified as to their value. The highest valuation testified to was \$500,000, the lowest \$40,000. One-half of the aggregate is \$270,000.

The court instructed the jury:

"You are instructed that if you find that the plaintiffs are entitled to damages under the evidence and instructions of the court, in ascertaining the amount of such damages, you shall ascertain the value of the property at the time that the plaintiffs demanded that the defendants reinvest them with their interest therein. You should deduct therefrom the amount of the claim of the Western Company with interest, to-wit: \$39,000.00, and then award the plaintiff four-sevenths of the balance remaining." (R.p. 112.)

Under such instructions, the jury brought in a verdict for \$132,000.00. If \$39,000.00 be deducted from \$270,000.00, four-sevenths of the remainder amounts to exactly \$132,000.00. Therefore, the verdict is tantamount to an actual finding by the jury that the mines at such time were worth \$270,000.00. It is not assigned that this finding by the jury was not sustained by the evidence. It must, therefore, upon this hearing, be assumed as a fact that the actual value of the mines was \$270,000.00.

ARGUMENT.

The assignments of error and brief of the defendants involve six propositions:

First, That under a proper interpretation of the contract the defendants never breached it.

Second, That under a proper interpretation of the contract the court erred in instructing the jury as to the measure of damages.

Third, That under any construction of the contract the court erred in instructing the jury as to the measure of damages.

Fourth, That the court erred in admitting testimony.

Fifth, That the evidence is not sufficient to establish a sufficient demand by the plaintiffs for reinvestment.

Sixth, That under the theory set forth in the opinion of the territorial supreme court the plaintiffs should have been required to remit a larger amount in order that the judgment should not be reversed.

The argument in support of the assignments of error in the admission of testimony are two fold:

(a) That such testimony tended to vary the terms of the contract; and

(b) That it tended to prejudice the jury.

We shall urge the converse of the foregoing propositions in somewhat different order. In discussing the contract and its proper interpretation, we will undertake to establish that even if error had been committed in admitting testimony bearing upon the construction of the contract, such error was without prejudice for the reason that the contract could not have received any possible interpretation other than that given it by the trial court.

I.

THE INTERPRETATION OF THE CONTRACT.

The court's construction of the contract (eliminating for the present the question of the measure of damages) was so obviously correct that argument would seem unnecessary. Counsel, however, have challenged it at pages 15 to 22 of defendants' brief, and we will therefore give it consideration.

The court's oral opinion upon the motion for an instructed verdict made at the close of the plaintiffs' case, and quoted at length in our statement and the court's instruction to the jury seem to us clear, full and convincing.

We shall eliminate all conversations that took place between McKittrick and the plaintiffs at Wilcox, and shall limit our consideration to the contract itself and that testimony as to the circumstances existing at the time of the execution of the contract, the admission of which is not assigned as error.

The property had been sold, and unless redeemed within two months would be lost to the corporation.

The Ryans had a contract with McPherson by virtue of which in their opinion they were secure against his judgment and execution sale. McPherson was defendants' witness.

McPherson testifies that in July, 1902, Ryan applied to him for a loan for the purpose of purchasing at sheriff's sale certain mining properties located near Gleeson, Arizona. That Ryan told him that he had already invested \$90,000 in the mines, which would be a total loss to him unless he could raise the money to purchase at sheriff's sale; that Ryan told him that by purchasing the property at sheriff's

sale he would shut out his partners Tevis and McKittrick, and that Ryan and McPherson would become the sole owners of the property.

He then testified:

"As an inducement for me to purchase said mines at sheriff's sale he said that the properties could be purchased at sheriff's sale at a cost not to exceed \$25,000 and that when the time to redeem would pass he would organize a corporation and sell a sufficient amount of the stock thereof to repay me the money invested, and that if I would advance this money he would divide the balance of the stock with me share and share alike." (R. pp. 104-105.)

Ryan testified to substantially the same effect. He says:

"I told Mr. McPherson about the judgment against the Copper Company and told him I wanted enough money to pay this judgment. He said if I was going to attend to it myself I could draw on him for the money. I said, if you let me have the money and the property comes to me after I get my money out and you get your money we will divide the property equally; so I left and had the property bid in." (R. 202.)

Defendants argue that Ryan's action in making this contract with McPherson was either actual or constructive fraud and that therefore any right which Ryan might have obtained through it would have inured to the benefit of the corporation and themselves as its stockholders; and they dwell upon this as one of the circumstances existing at the time of the making of the contract.

We cannot follow them in this reasoning. The actual legal relationship will afford no light to the court in ascertaining the intent of the parties if the parties did not know of or contemplate these niceties of law when they negotiated with each other.

The important circumstance is that the Ryans believed that they were secure against the McPherson judgment and execution sale, and that McKittrick so believed, and both of them furthermore believed that Tevis and McKittrick would lose their interest unless McKittrick could induce Tevis to advance the money or raise it from some other source.

Ryan's position under the McPherson contract was more advantageous to his brothers and himself than it would have been had the corporation redeemed the property. In either event the amount of the judgment was a first charge against all other property, but under the arrangement with McPherson the \$90,000 which the Ryans had invested was to be next in order as a charge against the entire property, and after its liquidation, they were to divide half and half with McPherson; whereas, should the company redeem the property then the \$90,000 investment of the Ryans was to stand on the same footing as the \$70,000 investment of the defendants, which obviously more than counter-balanced the difference between the four-sevenths which they held in the Turquoise Company and the one-half which they would have held in the company to be organized by themselves and McPherson. Therefore, when the parties met at Wilcox, while it was the fair and honorable thing for Ryan to make some kind of a contract which would save the defendants from being "frozen out," to use the term which they employed in their conversation, his interest in so doing was not nearly so great as was that of the defendants.

Whether or not the parties actually prepared a preliminary contract which was not executed, or whether McKittrick rejected some proposed suggestion of the Ryans saying that it was "too much like a promissory note" as Ryan testified, we will not consider.

The fact remains that the only inviting features of the contract which the parties did execute were in no sense obligatory. They were that the treasury stock would be sold for money with which to pay off the McPherson judgment, and to develop the property; that the 200,000 shares of stock issued to McKittrick, Trustee, would be sold at not less than par, and the proceeds used to pay back the amounts which the parties had invested. Had the defendants obligated themselves to accomplish these two purposes, the contract would plainly have been to the great advantages of the plaintiffs; but this obligation the plaintiffs did not offer, but as Ryan testified, refused to incur.

The wealth and financial standing of Tevis were well known. He was described in the prospectus issued by McKittrick as a "capitalist." (Record p. 307.)

In weighing the advisability of executing the contract, the Ryans doubtless felt that these circumstances would be helpful in the sale of stock. All of the parties testified that Tevis would have nothing to do with it without the control; that the Ryans should relinquish the control was a *sine qua non* and this requirement by defendants was not an unreasonable one, and the fact that Tevis and his associates had the control would also be helpful in the sale of stock. This the Ryans doubtless appreciated.

On the other side of the scale were the counter-balancing disadvantages of the proposed contract.

In the first place, as has been argued, it was not to the benefit of the Ryans. It was, however, the fair and honorable thing for them to do.

In the second place, the property was not withdrawn from jeopardy by the proposed contract. Tevis and McKittrick might not be able to sell enough treasury stock to pay off the McPherson judgment, and the contract did

not obligate them to do so. They did not obligate themselves to do the annual assessment work. The properties might be lost to the corporation. They did not obligate themselves to do any development work for they might be unable to sell treasury stock and procure the required money; and without development work there was no chance of selling the trustee stock at par.

To execute the contract meant that the property might be altogether lost, while to refuse to execute it, and have permitted the deed to be executed to McPherson would have eliminated forever the \$25,000 debt as a menace to the property.

We can readily see from these circumstances and considerations what the parties meant when their minds did meet. McKittrick doubtless held out to them the attractive features of the contract and extolled the expectations of selling the treasury stock and the trustee stock, but the Ryans had their doubts. This apparent deadlock was broken by the meeting of the minds of the parties upon the contract in question, and one can almost hear the Ryans saying to McKittrick:

"You believe you can sell the treasury stock and the trustee stock and we hope you can and think you can; but we do not know that you can. You do not know that you can because if you did you would obligate yourself. What, therefore, we will do is to permit you to go ahead and try. We will give you a reasonable time within which to try and while we do not ask you to guarantee success we will turn the company over to you and let you make the effort provided you will guarantee that if you fail you will see that we are no worseoff than if we had not entered into the contract."

The reasonable time was fixed at two years. The Ryans knew the danger of debt, and they did have two obligations inserted,

one, That the very first proceeds of the sale of treasury stock should be applied to the extinguishment of the debt; and the next that no debt should be incurred which would be a charge against their interest, which was in legal effect, an agreement that the corporation should not incur indebtedness;

and then, the important part of the agreement which is referred to by the territorial supreme court as the re-investment clause, and which reads as follows:

"The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect; otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part (defendants) to do any and all things herein required of them, then the interest of the second parties (plaintiffs) shall reinvest in them in the same proportion and ratio as they held and were possessed of on the signing of this agreement."

In order that the defendants might not be embarrassed in their efforts to sell the stock, it was also provided that none of the individual holdings should be sold until the trustee stock had been disposed of.

Tevis was to have ten days' time within which to sign the contract, and it was then provided "should he (Tevis) fail or refuse to do so, within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto."

We fail to see how any reasonable man can doubt but that by the words "requirements" and "agreements" and

"stipulations" the parties referred to the sale of the treasury stock and to the sale of the trustee's stock as contemplated in the contract.

We do not contend, and have never contended—although counsel for the defendants insist that we do—that the defendants guaranteed to sell the treasury stock or the trustee's stock. We expressly disavow any such contention, but we do contend that they agreed jointly that if at the end of two years they should have failed to sell the treasury stock for at least enough money to pay off the McPherson judgment and to provide \$20,000 for development stock and to sell enough of the trustee stock at par to realize not less than \$160,000, then that the interest of the defendants should reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement, and that it should be as if the contract had never been executed.

We submit, therefore, that without respect to any testimony which was offered as to the conversations at the time of the execution of the contract, it would have been the duty of the court had the proper demand for reinvestment been admitted to have been made upon the defendants, to have instructed the jury to bring in a verdict for the plaintiffs, and to leave them nothing to consider except the question of its amount.

II.

MEASURE OF DAMAGES.

We believe that the trial court's instructions to the jury on this subject was correct and that the territorial supreme court erred in holding to the contrary.

In such event the judgment should be affirmed even though under the theory of the territorial supreme court

as expressed in its opinion it had arrived at an erroneous decision.

We submit that, still eliminating all of the testimony whose admission was assigned as error, the court's instructions to the jury as to the measure of damages, was in pursuance of the proper interpretation of the contract. We will assume therefore that at the expiration of the two years, the defendants were obligated to reinvest the plaintiffs, and we will proceed with the inquiry as to what it was with which they had agreed to reinvest them.

Both sentences of the reinvestment clause bear upon this question. The provision that, should the defendants fail within two years to realize their expectations "then this agreement shall become null and void and of no effect," as well as the provision that in such case the interest of the plaintiffs should "reinvest in them in the same proportion and ratio as they held and were possessed of," are equally significant, and together they clearly mean that the defendants obligated themselves in the event of the failure of their claim to re-establish, so far as the Ryans were concerned, the status quo.

The defendants were to have a free hand for two years with but two limitations.

One, that if any treasury stock were sold the proceeds should apply to the extinguishment of the debt; and the other, that they should not permit the corporation to run into debt.

Of course, we do not claim that if the corporation had incurred debt, the debt would not have been a valid one. Our contention is that in such case the contract of the defendants would have been breached by them.

Counsel for the defendants argue, and the territorial supreme court holds, that the word "interest" necessarily

being stock, could not under any circumstances refer to the property. Our contention is that the meaning of the word "interest" was dependent upon the circumstances existing at the time of reinvestment; that in no event could it be construed to mean stock only, and that under certain conditions it might not have meant stock at all.

Suppose, for instance, that the corporation had failed to do its annual assessment work for the year 1903, and that on the 29th of November, 1904, the date of the expiration of the two years, some third party had located the claims, and the company have thereby become divested of all of its property. This might well have happened without any fraud on the part of the defendants. They might have believed that the property was not worth the annual assessment work and have been unable to sell any treasury stock. It seems plain to us that under such circumstances they would not have fulfilled their obligations to the plaintiffs by handing them their resignations as directors and officers of the company and a lot of worthless stock. To have done so would have been to re-invest the plaintiffs with four-sevenths of the stock of the Turquoise Company and with the control and management of it, the company owning nothing, whereas the interest which the plaintiffs had "held and possessed" consisted of four-sevenths of the stock of the corporation which did own these mining claims.

In such supposititious case the defendants, as stated, might have acted in good faith and yet they would have breached the contract, and had the Ryans brought an action to recover damages for such breach the instruction to the jury would have been just that which was given by the trial jury in the instant case and if true that the mines were not worth the assessment work the jury would have brought in a verdict for nominal damages.

By permitting the locations to become forfeited, defendants would have taken their chances on their ability to establish that the claims were of less value than the \$25,000 indebtedness, and would, as stated, have committed a breach of contract although untainted perhaps by any moral obliquity. But the conclusion cannot be escaped that their freedom from substantial liability for the breach would depend upon their ability to establish the value of the mines to be less than the amount of the indebtedness and assessment work; and to escape from the imputation of moral wrong in such breach, they would have had to establish that they believed the property was not worth such amount.

Again, let it be supposed that the corporation under the management of the defendants and within two years had been divested of its properties by failure to do the annual assessment work or in any other way, and that at the end of two years the Ryans had demanded reinvestment. If the defendants could then procure the owner of the mines, whosoever he might be, to convey four-sevenths of them to the Ryans, subject always to the original indebtedness, they would have fulfilled their contract. If they could procure such owner to organize a corporation and convey the property to it, then a tender of four-sevenths of the stock of such corporation (its indebtedness being not greater than the original indebtedness) would have been a fulfillment of the contract.

The word "interest" is more comprehensive than "stock." The ownership of stock is always an ownership of an interest, but the ownership of an interest may or may not be an ownership of stock. The giving to the Ryans of enough stock to make their ownership four-sevenths of the total capitalization might, under some circumstances, have been a compliance; but it could not, and would not, be

such compliance unless the giving of such stock to the Ryans actually and as a matter of fact did make their interest substantially the same as it was at the time of the execution of the contract. It seems to us that this is the only just and logical construction. The law looks to the substance rather than to the form and will render to the plaintiffs actual compensation and this is what the court's instruction to the jury provided for.

As a matter of fact, at the time of the expiration of the two years and at the time of the demand by the Ryans, the Turquoise Company did own the mines. If, therefore, in response to such demands, the appellants had turned over to the Ryans a sufficient amount of stock to make, with the 279,500 shares which they already had received, the required four-sevenths and at the same time had turned over to the Ryans the management of the corporation just as they had it at the time of the signing of the contract and had reduced the indebtedness to what it had been, this doubtless would have been fulfillment. But they did not do this and the failure to do so constituted the breach. The question under consideration is, what were the damages by reason of such breach?

It is provided in the contract that in consideration of 240,000 shares of the capital stock of the company being placed in its treasury for sale, the moneys from such sales shall be used, first, to pay off and liquidate the McPherson judgment.

It is alleged in paragraph 3 of the complaint that on the 26th of January, 1903, the McPherson indebtedness was paid out of the proceeds of a \$30,000 note which the company, under the management of defendants procured to be issued to the defendant Tevis, such note bearing interest at the rate of ten per cent per annum, compounded

half yearly, and that the defendants "thereafter on or about the 14th day of March, 1904, sold 32,000 shares of the 240,000 shares of the stock of said corporation placed in the treasury of said corporation, as set out in said agreement, a copy of which is attached hereto, marked Exhibit 'A', for \$8,000, and failed to apply the said sum to the payment of the said sum of \$25,262.60, or of any part thereof."

The failure of the defendants to procure such \$8,000 to be applied to the reduction of the note which had been substituted for the McPherson indebtedness, obviously constituted a breach of the contract.

McKittrick testifies:

"I went to Tombstone and redeemed the property. We gave Tevis the note of the Turquoise Copper Mining and Smelting Company for the money and he loaned the company \$30,000 with which I redeemed the property, under the authority conferred in the resolution. * * * When the interest became due the Board of Directors of the company passed a resolution and issued a note for the interest." (Record, pp. 267-8.)

"I paid for the diamond drill out of the \$9,500 received on the sale of stock, and then we had to re-timber the shaft. I also paid for the patents, attorneys' fees and land office fees out of this \$9,500. All of the \$9,500 went into the property for necessary things, leaving a balance of \$324 which is on hand." (Record, p. 288.)

Cross-examination by Mr. Ives:

"I bought the diamond drill right after the meeting at Wilcox and the signing of the agreement; paid \$2,500 for it; bought it from a mining company in the neighborhood." (R. p. 288.)

The note for \$30,000 to Tevis was authorized at a meeting of the directors on the 26th of January, 1903.

The Ryans were not present at such meeting. It was the first meeting of the directors after the accession of the defendants to the management of the corporation. The resolution ordered that Tevis and McKittrick be authorized to redeem the property of the corporation from the judgment sale (R. p. 123); provided for the execution of a note not exceeding \$30,000, and then continued: "It is further ordered that the said promissory note, together with the interest thereon, shall be paid out of the *first moneys arising from the sales of the 240,000 shares of the treasury stock of such corporation.*" (R. p. 123-4.)

Appreciating that the redemption by means of the proceeds of the note instead of by the proceeds of the sale of treasury stock was not a literal compliance with the contract, McKittrick caused a copy of this resolution to be sent to the Ryans at Leavenworth, for their ratification (R. p. 264.) The Ryans in February signed such written ratification. It will be noted that the resolution above quoted so ratified by the Ryans contained a provision that the note so issued should be paid out of the first moneys arising from the sales of treasury stock.

The issuing of the note and its ratification by the Ryans therefore strengthened rather than impaired the contractual obligation of the defendants to apply the first proceeds of the sale of treasury stock to the liquidation of the indebtedness.

It is obvious from the contract itself, as well as from the circumstances attending its execution, that its dominating cause was the McPherson indebtedness. In spite of the fact that the properties were believed by all of the owners to have great value (see prospectus sent out by appellants, page 301, a claim against the company was suffered to go to judgment and the property to be sold under

execution. Before its sale the Ryans made vigorous efforts to protect their interest which resulted in the purchase by McPherson in pursuance of his agreement with Ryan. McKittrick bitterly complained of being frozen out. According to McKittrick's testimony, although this is denied by Ryan, the Ryans had apprehensions as to the good faith of McPherson and felt that their interest was in jeopardy. However this may be, the salient fact remains that the McPherson indebtedness was the element in the existing conditions which was the most potent in super-inducing the execution of the contract.

Subsequently and in 1904 the balance of the treasury stock was sold for \$1500 and none of that sum was applied to the payment of the indebtedness.

It follows, as we have seen, by arithmetical demonstration that the verdict of the jury was that the properties of the corporation were worth \$270,000. The debt evidenced by the first judgment and the Tevis note were an existing imminent menace to this property. This fact was not only in contemplation by all parties at the time of the execution of the contract, but, as has been said, was the impelling motive of the contract.

The defendants breached the contract by failing to diminish the menace. Because of the inability of the corporation to respond to this indebtedness, its properties were sold and lost to it, and the stock which the Ryans owned or might have become the owners of, was rendered valueless. The damage occurred upon the execution of the sheriff's deed to the Western Company and was the direct result of the breach of the contract by defendants, and therefore the proper measure of damages was as instructed by the court.

III.

THE DAMAGE OCCASIONED BY THE SACRIFICE OF THE PROPERTY WAS THE PROXIMATE EFFECT OF THE BREACH OF CONTRACT TO SO APPLY THE \$9,500, AND WAS RECOVERABLE.

The familiar doctrine as laid down in the leading case of *Hadley against Baxendale*, 9 Ex. 353, is:

"Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it."

Discussing this case, Sutherland in his work on Damages, says: (Section 50, 3rd Ed. Vol. 1, p. 149.)

"It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to them. If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure special gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at a contract of this character silent as to the circumstances which were in view, such damages are consequential and sometimes appear to arise very

remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated."

In the case of *Jones against George*, (61 Tex. 345, 48 Am. Reports, p. 280) the Court says:

* * "but if it appears that the contract was made for the express purpose of avoiding a loss likely to occur from a known natural cause, which could be controlled and avoided; that this was known to the contracting parties, and that compliance with the contract would have prevented the injury by destroying the thing which immediately inflicts it, then it is believed that the breach of such a contract must be said, within the meaning of the law to be the direct cause of the injury." * *

Further discussing consequential damages for breach of the contract, Sutherland says: (Section 52, Vol. 1, 3rd Ed., p. 165.)

"What the damages would ordinarily be on such a default is immaterial if the contracting party assume the obligation which he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties would be to sacrifice substantial rights to arbitrary rule."

And again the same learned author at the conclusion of his treatise on the subject in the same section says, at page 168:

"Where the injury is within the contemplation of the parties, if they give the subject consideration

when the contract is made, they are admonished by the principle of compensation in the law that, if they do not perform, the alternative of making reparation on the scale of equivalence to the actual injury will be compulsory."

The question of the measure of damages for breach of contract to pay or loan money has been the subject of much discussion by the courts. In such cases some courts have felt themselves restricted in determining the amount of damages recoverable by the principle that the law in fixing a rate of interest for money conclusively presumes that such rate measures the value of such money. The law, however, has been settled by modern decisions to so apply the principle laid down in the case of *Hadley against Baxendale*, as to permit the recovery of special damages in cases like the one at bar where the purpose for which the money was needed was known to and within the contemplation of the parties. Sutherland says (Sec. 77, Vol. 1, 3d Ed., p. 229):

"Where the obligation to pay money is special and has reference to other objects than the mere discharge of a debt, as where it is agreed to be done to facilitate trade, and to maintain the credit of the promise in a foreign country, to take up commercial paper, pay taxes, discharge liens, relieve sureties, or for any other supposable ulterior object, damages beyond interest for delay of payment, according to the actual injury, may be recovered."

And again, at the conclusion of such section, at page 234, he says:

"Where one person furnishes money to another to discharge an incumbrance upon the land of the person furnishing the money, and the person undertaking to discharge it neglects to do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished with

interest, or the value of the land lost, according to circumstances."

In the case of Doushness against Burger Brewing Company, 47 N. Y. S. p. 312, the fixtures of the plaintiff were covered by a chattel mortgage. A contract was made between the defendant and himself whereby the defendant agreed to loan him \$700 on demand, the amount so loaned to be used principally in payment of the existing encumbrance. The Brewing Company loaned the plaintiff \$100 and refused to advance him any further sum. Whereupon, the property was foreclosed under the chattel mortgage and lost.

The Court sustained a judgment in favor of the plaintiff for substantial damages, holding that the true measure of damages was the difference between the value of the property and the amount of the encumbrances upon it. The court said (p. 14):

"The loss to the plaintiff by the foreclosure was the direct result of the failure of the defendant to apply the money according to its promise to satisfy the Consumers' Company lien. Had the money been used as the defendant agreed to use it, the property would have been saved to the plaintiff; and the excuse for not advancing it being, by the verdict of the jury, an insufficient one, the responsibility for the loss to the plaintiff rests upon the defendant."

It will be noted that the facts in this case have an additional similarity to those in the instant case in that there was a partial compliance by the Brewing Company, just as in the instant case the amount withheld from application to the indebtedness was only a part of the amount of such indebtedness.

The most recent case on this subject, reviewing the law and citing with approval the above quoted portion of

Sutherland on damages is Hedden against Schneblin, reported in 126 Mo. Ap. 478, 104 S. W. p. 887.

In that case the defendant orally agreed to loan the plaintiff money with which to pay a mortgage debt. The defendant failed to pay such money and the property was lost. The plaintiff was held entitled to recover special damages consisting of the actual value of the property less the amount of the encumbrance. The Court said:

"The general principle controlling the measurement of damages in actions founded on breach of contract is that compensation should be equal to the injury, but only such consequential damages are allowed as may be said to be the natural and proximate consequence of a breach; i. e. such as ordinarily results in that class of cases. Remote, indirect or speculative damages are not recoverable. Hence, where the breach is of an agreement to lend money at a particular time, the general rule is that the measure of damages is the amount of the difference between the interest on the loan at the contract rate and at the rate (not exceeding that permitted by law) which the borrower would have had to pay for the money in the market, since, in legal contemplation, money is always in the market and procurable at the lawful rate of interest. But the controlling rule to be applied in settling the question of whether a recovery of consequential damages peculiar to the given case should be allowed is to ascertain whether from the terms of the contract, considered in the light of its special circumstance known to both contracting parties, it reasonably may be said that the special injury was the natural and proximate result of the breach of a contract made under such special circumstances. Whenever a direct causal relation is disclosed between the wrongful act and an injurious result, then such a result must be deemed to have been within the contemplation of the parties at the time they entered into the contract, and the delinquent party should be held to answer in damages for the special

injury thus inflicted. (Citing Sutherland on Damages and numerous cases.) Special circumstances exist in the present case which would make the application of the rule under which nominal damages only could be recovered a flagrant injustice. Plaintiff would not have purchased the property but for the assurance of the loan for the time agreed. Defendant made the promise as an inducement to the sale, knowing that the plaintiff was in a position, owing to his lack of other means and to the fact that the amount of the incumbrance as compared to the value of the property was so great, that he could not go into the money market and offer security on which he could hope to procure a loan. Under such special circumstances to hold that in legal contemplation the money was in the market for him, and that all he had to do was to go and get it, would be just as false as it would be unjust. A fiction of this character though its use may be justified as a shield to protect the contract breaker against liability for remote damages, should not be employed to protect him from liability for those damages he must have known would be sustained by the injured party."

In the case of *Bank of Commerce against Bright*, 77 Fed. p. 949, the bank agreed with Bright for a valuable consideration, that it would renew certain notes of an oil company upon which Bright was an endorser, and that any money which the oil company could pay during the year, should be applied to the reduction of the paper upon which Bright was accommodation endorser. The bank further agreed that the oil company should continue in business for a year without changing its relation with the bank. Within a month after the making of the agreement the bank recorded mortgages upon the properties of the oil company. The failure of the oil company immediately ensued. Its property was attached and the outcome was the small sum of \$2,000 saved by the general creditors. The

bank sued Bright upon his endorsements. He set up as a counterclaim the breach of the bank's agreement with him. It was held that Bright was entitled to recover more than nominal damages.

In the case of Gallup against Miller, 25 Hun., p. 298, the facts were that, Phebe Gallup, the widow of one Charles Gallup, was entitled to a dower interest in the real estate of which he had died seized. She had executed a mortgage upon her dower interest for \$340. An action was commenced to foreclose the mortgage, whereupon she and the defendant entered into an agreement whereby the defendant agreed that he would procure an assignment of the mortgage and would forbear its collection by sale of the premises under decree of foreclosure for one year. He procured the assignment of the mortgage but subsequently violated his contract by assigning the mortgage and foreclosure decree to a third party, who caused the premises to be sold before the expiration of the year. The premises sold for the amount of the decree.

The plaintiff sued for breach of contract. The lower court awarded judgment in favor of the plaintiff for the difference between the value of her dower interest computed according to the annuity tables and the amount of the decree with interest and taxes. This judgment was affirmed upon appeal, the Court saying:

"It is now claimed that the referee adopted an improper measure of damages; that the true measure of damages would be the use of her interest in the premises from the time that it was sold, and she deprived of the possession thereof up to the end of the year. I am, however, of the opinion that the referee adopted the proper rule of damages. It was by reason of the breach of contract that Mrs. Gallup lost her dower interest in the real estate. All losses and damages arising from breach of contract may be recovered,

where they can be rendered reasonably certain by evidence, and have actually resulted from the breach, and are not speculative and uncertain."

Gallup vs. Miller, 25 Hun., at page 299.

In the case of Graham vs. McCoy, reported in 17 Wash. 63; 48 Pac. p. 780, the Court said:

"It is true that the measure of damages for failure to repay money when due, or ordinarily to furnish money for any purpose, is legal interest, but always, if any special damages accrue, they may be the subject of compensation. The familiar illustration of the rule of damages for breach of an agreement to protect a draft shows that whatever damages are reasonably in contemplation of the parties at the time of the contract is made may be recovered for a breach; and so with failure to furnish supplies. And, if such damages are susceptible of computation upon competent testimony, they may be recovered.

„THE DEFENDANTS COULD NOT PROCURE THEM ELSEWHERE. THIS INABILITY WAS KNOWN WHEN THE AGREEMENT WAS MADE BY THE MORTGAGEE."

It will be noted that in the instant case both defendants knew that the Ryans were in such a condition of financial embarrassment as to preclude them from coming to the financial rescue of the corporation.

IV.

THE WORD "INTEREST" UNDER THE CIRCUMSTANCES EXISTING WHEN THE ACTION WAS COMMENCED MEANT VALUE OF FOUR-SEVENTHS OF THE PROPERTY.

It must always be borne in mind that the verdict of the jury has irrevocably established the fact that the in-

trinsic value of the property was \$270,000. The law will not presume that it would have been sacrificed for \$39,000 had the Ryans had the management or control of it.

The property, as a matter of fact, was lost when the sheriff's deed was executed to the Western Company; one of the breaches which led up to the damage had been made when McKittrick failed to apply the first \$8,000 to the payment of the McPherson judgment. The last breach was when in July, 1905, McKittrick permitted judgment to be entered against the Turquoise Company for \$9.975 alleged to be due for back salary; this breach was emphasized and accepted by the defendants when, at the directors' meeting held on the 12th of December, 1905, Tevis, McKittrick and Rice being the only directors present, upon the report of the Secretary, namely, McKittrick, that he had obtained a judgment against the company for \$9.975, they adopted the resolution, the purpose of which was to ratify the breach.

We believe that at such time a cause of action had accrued by reason of the first breach in the early part of 1903; but the actual damage which followed as the result of the breach did not take place until the company was divested of its property; and for that reason, if for no other, the instruction of the court to the jury which is assigned as error, was technically as well as substantially correct.

We believe furthermore that it appears upon the face of the contract that the parties themselves had in mind by the use of the word "interest" an interest which represented four-sevenths of the property less the indebtedness. It is, of course, true as said by the territorial supreme court that the Ryans had never been invested with the property and that, therefore logically they could never be reinvested with it; but it does not follow, and it is here

that we take issue with the Supreme Court, that the parties did not intend by perhaps an improper use of the word "re-investment" that they should get back an interest which was in value four-sevenths of the property.

None of the parties were thinking of stock or its market value or the rules of law whereby the values of stock in cases of conversion or otherwise are established. If any one had asked the Ryans what was their interest in that group of mines, in answer their ordinary expression would have been, as it is with all persons similarly circumstanced, that they owned four-sevenths of it, and McKittrick would have made a similar response to a similar question. To them the corporation as it existed prior to the execution of the contract was a mere agency holding the property in trust for the two sets of owners. It is by no means sure but that a third party might not have maintained an action against any one of them for labor or material furnished in the operation of the mines, on the theory that as a matter of law they were co-partners. They did not even go through the form of having the corporation borrow money from themselves. It issued no notes; it passed no resolutions authorizing the expenditure or the incurring of obligations except in the sole instance of the purchase of the contiguous group of mines from Bryant.

That this was the view the parties took of their relationship to the property at the time of the execution of the contract is furthermore manifest from the clause of the contract heretofore quoted:

"The parties of the second part shall not be liable for any of the expense connected with the operation of this company excepting the expense of selling the stock held in trust for the parties hereto."

Naturally, neither the parties of the second part nor the parties of the first part would have been liable for any

of the expense connected with the operation of the corporation. On the other hand the corporation could, under no circumstances have been liable for the expense of selling the stock issued to a trustee, the beneficial ownership of which was in Tevis, McKittrick and the Ryans. Yet, the phraseology of the above quoted paragraph would indicate that such expense of selling trustee stock was an expense connected with the operation of the company. It is thus plain from the very terms of the contract that the parties not only habitually treated but in making their contract regarded their interest, either as an interest in the property owned by the corporation, or certainly as something much more comprehensive than their mere stock holdings.

But whether they were partners or not is immaterial. The question is what they had in mind at the time they prepared and signed the contract; and there having been no dispute in the evidence as to how prior to the contract the affairs of the corporation were conducted, we believe that without regard to any of the breaches of the contract, other than the failure to reinvest, when it appeared to the court that prior to the commencement of the action, the properties had been lost to the company, and that therefore the return of enough stock to constitute four-sevenths, could not constitute reinvestment, it became its duty to instruct the jury as it did. It was impossible for the defendants to reinvest the plaintiffs with the interest which they had at the time of the contract, which, as we have said, was the value represented by the ownership of four-sevenths of the stock of a corporation owing \$39,000; the measure of the damages therefore was necessarily the value of such four-sevenths of the property. It will be observed that the Court never did instruct the jury that the defendants had agreed to reinvest the Ryans with four-sevenths of the property. It was unnecessary to tell the jury what the

contract was. As we said at the outset, that which it was necessary for the defendants to reinvest the Ryans with, could only be determined by circumstances. The Court, however, properly instructed the jury in the light of the circumstances, as existing at the time of the commencement of the action, that the measure of damages was four-sevenths of the value of the property (less the indebtedness) at the time of the demand for reinvestment.

V.

THE VALUE OF THE PROPERTY LESS THE INDEBTEDNESS OF THE CORPORATION IS THE VALUE OF THE TOTAL ISSUE OF THE CAPITAL STOCK OF THE CORPORATION.

The entire argument of the defendants attempting to differentiate between "interest" and "stock" is a distinction without a difference.

It is clear from the evidence that the stock had no market value, therefore its value depended upon the value of the property of the corporation in excess of its liabilities.

McDonald vs. Danaday, 196 Ill. 133;

Nelson vs. First National Bank, 69 Fed. 789;

Hewett vs. Steele, 118 Mo. 463;

2 Cook on Corporations, Sec. 581;

Cuchfield vs. Julis, 147 Federal 65; at page 73;

Huse & Loomis Ice Company vs. Heinze, 14 S. W. 756, 102 Mo. 245.

If there be no evidence as to the value of stock, it will be presumed that its actual value is its par value.

Appeal of Harris, 12 Atl. 743; at 753 (Pa. St.)

Brinkerhoff vs. Savings Bank, 118 Mo. 447; 24 S. W. 129.

If the value of the stock be assumed to be its par value, then the amount of the verdict is less than it should have been and the defendants were benefited rather than prejudiced by the instruction complained of.

If, however, the value of the stock is to be ascertained from the evidence, then the instruction of the court (assuming for the present that the plaintiffs' damages is to be estimated upon the ownership of four-sevenths of the stock), stated the measure of damages properly and concisely to the jury. It was unnecessary for the court to instruct the jury to ascertain the value of four-sevenths of the stock of the corporation and then to supplement such instruction as would have been its duty by the further instruction that the way to ascertain the value of the stock was to ascertain the value of the mines and to deduct therefrom the amount of the indebtedness. The instruction which the court gave was clearer and more concise and was in effect precisely the same as if it had instructed the jury so to ascertain the value of the stock.

In other words, as stated by the district court, in the last analysis there is no difference between a computation of damages upon the value of the stock and one upon the value of the property.

VI.

THE ONLY QUESTION THEREFORE LEFT TO BE CONSIDERED IS, WAS THE APPELLEES' RIGHT OF RECOVERY LIMITED TO THE VALUE OF 291,928 SHARES OF STOCK THE NUMBER WHICH WOULD HAVE BEEN NECESSARY WITH THE 279,500 SHARES ALREADY OWNED BY APPELLEES TO CONSTITUTE FOUR-SEVENTHS OF THE ENTIRE CAPITALIZATION.

It seems clear to us that an instruction limiting appellees' right of recovery to the value of the additional stock would have done them substantial injustice.

"In the measure of damages for breach of contract, the damages should represent the loss *actually* sustained."

Clark on Contracts, p. 486.

"Compensation is the basic principle of damages."

8 Am. & Eng. Ency. Law, p. 627.

"The measure of damages is the amount necessary to put the party injured in the same position as if the contract had been performed."

8 Am. & Eng. Ency. Law, p. 633.

"The measure of damages is the amount sufficient to place the injured party in the same position as he would have been in, had he not entered into the contract."

3 Ind. 107.

"The measure of damages is the amount required to place the party in the same position as if no breach has occurred."

21 Minn. 225.

"The remaining question is one of damages. The plaintiffs were entitled to recover all such as flowed

naturally and proximately from the breach, and were not limited to the bare amount of their share of the rents misappropriated, with the lawful interest upon it. Such a recovery would not recompense their loss, or restore them to the condition which would have resulted from performance."

Tuers et al. vs. Tuers, 100 N. Y., p. 201.

When the contract was made the interest of the Ryans was worth four-sevenths of the difference between the assets and the liabilities of the corporation. Tevis and McKittrick in violating their contractual obligations refused to reinvest them. Such interest was rendered valueless and they were compelled to seek legal redress.

It seems clear, therefore, that the actual damage which they sustained was the value of such interest which they lost, and that the instructions of the court was, as has been previously argued, both technically and in substance correct.

As a matter of fact if defendants had complied with the contract, and upon demand by plaintiffs in February, 1905, had given to them the 291,928 shares necessary to make up the four-sevenths, and had resigned as directors, and had turned over to them the books of the corporation, and had put them in possession of the mines, and have reduced the indebtedness to what it had been, the plaintiffs would have owned that which under the above rules for the ascertainment of the value of the stock represented four-sevenths of the property, less the indebtedness. Under the instructions of the court, the jury have determined that that property was worth two hundred and seventy thousand dollars.

In February, 1905, the corporation owned it, and its liabilities consisted of its notes held by the Western Company. The defendants deliberately refused to fulfill their

contractual obligation, and wrongfully continued to control and manage this \$270,000 of property. They so managed and controlled it that it was irretrievably lost to the corporation, was sacrificed for some \$39,000. This loss must be conceded to be an actual loss. The 279,500 shares of stock of the plaintiffs has become worthless. Certainly it does not lie in the mouth of the defendants to assert that even if they had passed over the control to the Ryans, this loss would have occurred just the same.

The fact is that the property was worth \$270,000 and was sold for \$39,000. The speculation and conjecture, therefore, consists in the assumption of the defendants that such actual loss would have occurred just the same if they had fulfilled their obligation, and the plaintiffs had been placed in control of the property.

The plaintiffs stand upon the solid foundation of fact, to-wit, that \$270,000 of property was in a few months sacrificed for \$39,000. It is the defendants who do the conjecturing when they undertake to argue that their failure to turn over the management, an admitted breach of their obligation, did not actually damage the plaintiffs for the assumed reason that if the plaintiffs had had the control, such great loss would have occurred anyhow. It is impossible to escape the conclusion that in order to limit the plaintiffs' damages to the value of such stock necessary to have made up their four-sevenths, the court must speculate that the plaintiffs, if in control of the management, would have been unable to obtain for the property its actual value.

This precise principle was passed upon in the case of *Hampton Stave Co. vs. Gardner*, 154 Federal 805.

Gardner had made a written contract with the Hampton Stave Co. whereby the Hampton Stave Co. agreed to sell Gardner within sixty days 5,000 acres of land for the

sum of \$20,000, and agreed to furnish him within a reasonable time proper abstract of title to the land. Gardner paid \$1,000 on the signing of the contract. The Hampton company furnished an incomplete abstract of title to the land, and though requested, failed to furnish any other within the sixty days. The land was worth \$30,000. Gardner sued to recover damages to the amount of \$11,000, being \$10,000 difference between the purchase price and the value of the property and \$1,000 which he had paid. Judgment was rendered in favor of Gardner, from which the Hampton company appealed to the Circuit Court of Appeal. That court in its opinion affirming the judgment, said at pages 806-7:

"The next objection is that there was no averment or proof that the vendee would have taken and paid for the land pursuant to the contract if a correct abstract had been furnished, and that the court refused to admit evidence offered by the vendor, to the effect that he would not have done so. But that evidence was immaterial. What the parties would have done if the vendor had not violated its agreement was a speculative and irrelevant issue. It had committed the first breach of the contract, and had thereby given to the vendee the right to recover the legal damages which resulted from its wrong, and the only issues in the case were the breach and the amount of damages.

* * *

"The measure of damages for its breach of this covenant in the contract was the natural and probable loss which the vendee would sustain on account of that breach, and that was the value of the option, the difference between the value and the contract price of the land, and the vendor could not lawfully take advantage of its own wrong by proof that the vendee would not have realized this value if it had performed its covenant. Upon a breach by a vendor of a covenant to furnish an abstract of title in a contract which grants a time option to purchase land, the measure of

damages is the difference between the contract price and the value of the land, and the issue whether or not the vendee would have purchased the land if the vendor had furnished the abstract is speculative and immaterial."

In the case of *Griggs vs. Day*, 158 N. Y. 1, 52 N. E. 692, the Court of Appeals of the State of New York has directly passed upon the principle involved. That case had twice before been before the Court of Appeals. The defendants had been obligated to deliver to the plaintiff 12,171 shares of railroad stock. The railroad had become insolvent, and a reorganization was effected. Under the terms of the reorganization, it was provided that stock in the new company should be issued in exchange for stock of the old company, provided that a cash payment of \$35 per share were made therefor. The defendant claimed that the plaintiff was not entitled to damages for the 12,171 shares of the stock of the old company which it appeared that defendant had wrongfully withheld from him by reason of the fact that if the plaintiff had had such shares he would not have been willing or able to pay the \$35 per share which was necessary, in order to exchange them for stock of the new company. It was conceded that if the holder of the stock of the old company had not paid such \$35 per share at such time, such stock of the old company would have been worthless. The court says:

"He (the plaintiff), had the right, if he so determined, to enter the new reorganized company, and to make use of his stock for that purpose; and we think that we ought not to assume that he would not have done so, but rather, that the executors, after converting and retaining his stock, and thus preventing him from entering the reorganization, ought to be estopped from claiming that he would not have availed himself of the privilege had the stock been returned to him."

Griggs vs. Day, 52 N. E. 697-8; 158 N. Y. 1.

The defendants to paraphrase the language of the New York Court of Appeals, should be estopped from claiming that the Ryans would not have succeeded in obtaining for the properties of the corporation the actual value thereof if defendants had fulfilled their contractual duty and turned over the management of the corporation to the plaintiffs.

The principle is established in the case of Weedon vs. Baltimore & Ohio R. R. Co., 78 Fed., p. 584.

In this case a judgment had been obtained against the Baltimore & Ohio Railroad Company.

The facts were that, the Baltimore & Ohio R. R. Co. had appealed from a judgment obtained against it and directed Weedon, the clerk, to do certain things which were essential to the perfecting of the appeal. Weedon neglected to perform the duty so demanded of him, and as a result the appeal was dismissed, and the railroad company required to pay the judgment. The Railroad Company thereupon sued Weedon upon his bond, for the full amount of the judgment which it had been so compelled to pay.

The Court said:

"The defendant deprived the plaintiff of its legal right to contest the question of its liability to another for \$2,130 in a Court of Error. What is that right worth? Really its value depends on the probability of a reversal and the successful event of a new trial. Ordinarily on a proceeding in error the judgment of the court below is presumed to be correct until it is shown otherwise. Can the clerk who negligently prevented the proceeding in error rely on that presumption to escape being mulcted in damages for depriving the plaintiff in error of the privilege and right of meeting and overcoming it? We think not. * * * The plaintiff should be entitled to recover all that the negligence of the defendant has caused him to pay

unless the officer can show that even if he had not been negligent the complaining litigant would have had ultimately to pay the same amount."

With all respect to the argument of counsel for the defendants, there can be no substantial doubt but that at the end of the two years stipulated in the contract, it was the honest duty of the defendants to reinvest the plaintiffs. Their failure to do so was deliberate and wilful. The most charitable eye cannot find in their action aught than an ignoring of their contractual obligations.

The record does not disclose, and it was impracticable for the plaintiffs to have it disclose, the real value of the mines which had belonged to the Turquoise Company.

A diamond drill is a useful instrument, but its service is only for the benefit of him who operates it. It extracts from the ground a small core of ore and fulfills its service when it delivers to its operator this core of ore. It does not make a shaft in it which others may enter and observe the character of the ground in which it has penetrated. The core of ore is taken by the operator of the drill and he knows, and he only, the values which are invisible to every other eye. It was impossible for the plaintiffs to know or to prove the great value of these mines. It does not appear in the record, and as we have said, it was impossible for the plaintiffs to have it appear there what really was disclosed by the operations of the Diamond drill. Hearsay evidence, rumors and opinions are not proof. The fact is that shortly after Jepp Ryan met McKittrick at the Hollenbeck Hotel and told him that the Ryans proposed to take some action in furtherance of their rights the defendants became active in divesting the company of these properties. Such conversation took place probably in February, 1905. In April (record page 134), the Western Company

served a written notice upon the Turquoise Company that it wanted the principal and interest of its note.

In May the action was commenced in Kern County. Then followed the judgments and the execution sale. The defendants refer to the \$132,000 verdict as being an oppressive one.

The record discloses (page 101) that after the verdict and judgment and before defendants' motion for a new trial was denied, the plaintiff stipulated that they would satisfy this alleged oppressive judgment upon the receipt from the defendants of some instrument in writing assuring to the plaintiffs a four-sevenths interest in the property owned by the Turquoise Company on the first of February, 1905, subject to a \$39,000 indebtedness.

The mines were contiguous to the Copper Belle Mines, one of the greatest properties in Arizona (R. p. 245). Tevis and McKittrick and Rice concededly acting merely for the defendants' accommodation, were the organizers of the Tejon Mining Company. Every vestige of the property of the old Turquoise Company is indisputably in the possession of the Tejon Mining Company, and McKittrick has continued its operations just as he did the operations of the Turquoise Company since November, 1902, when the contract in question was executed. It would seem strange that those obligated as the defendants were on the 29th day of November, 1904, to turn over to the plaintiffs enough stock of the company to give them the control and to resign as officers and directors of the company should be able contumaciously to say to the plaintiffs "you own this stock and we know it, but you shall not have it. Bring your suit. If you bring your suit your recovery will be limited to the value of the stock tested by the ordinary rule, that the value of property is what it would bring at a sale which

is not forced and you will never be able to establish a value proportionate to the actual intrinsic value of these mines which we propose to keep"; and to keep the stock and thus in effect force those whose right to the stock they had violated to sell their stock at a price not agreed to by the vendors, but to be fixed by a court or jury after the burden of litigation.

Had the plaintiffs undertaken, as was, of course, within their legal right, to institute an action on behalf of the Turquoise Company to recover the property, they would have been confronted with numerous and perhaps insurmountable obstacles.

The testimony of Tevis that he had nothing to do with the institution of the action by the Western Company against the Turquoise Company is undisputed.

To a reasonable man it is incredible, but how could the Ryans get proof? The Western Company was a third party. It had advanced money to a corporation which was entitled to be repaid, which had the right to institute an action and which did so, and the judgment was just and the execution and the sheriff's deed followed as a matter of course, and as a matter of law.

Proof as to the ownership of the stock of the Tejon Company was entirely in the hands of Tevis and McKittrick and the plaintiffs were virtually at their mercy, and this action for damages was brought. The verdict was just.

It is argued in defendants' brief that other elements than the difference between the assets and liabilities of an insolvent corporation should be considered in estimating the value of its stock. We can understand that that may be so under some circumstances; but we urge that under the circumstances as disclosed by the record, the defendants should not have been permitted to contend that the value

of the stock was less than its book value or the difference between its assets and its liabilities. Such book value is as a matter of fact its actual intrinsic value, and to permit the defendants deliberately to keep it without the vestige of a right to it, and then, when called upon to respond in damages, to adduce proofs of sales which they themselves had made, as evidence that it was worth a lesser sum would be, it seems to us, to put a premium on wrong doing.

Defendants resist the contention that they were obligated under the contract to do more than to turn over to plaintiffs sufficient stock to make up with what they had, their original four-sevenths' ownership thereof.

The Territorial Supreme Court adopted this view, and stated:

"This contention, however, is based upon a premise which has already been eliminated. *There was no duty upon the part of the appellants to restore to the appellees the management and control of the corporation, except insofar as a right to management and control would flow from a restoration to them of a majority of the capital stock, and there is no showing that a corporation election would have been held in the interval between the breach and the loss of assets.*" (Italics are ours.)

The part of the opinion thus referred to as eliminating the contention of the plaintiffs is as follows:

"Now in reaching this conclusion have we lost sight of the further contention of the appellees that, even if the word 'interest' be not construed to mean 'property,' it should be construed to include a restoration to the appellees of the management and control of the corporation. The placing of this meaning upon the word 'interest' is inconsistent with the distinction which the parties themselves have made in the contract itself, wherein the appellees agree 'that the officers of said corporation representing their inter-

ests' should resign and allow the appellants to select such officers as they may desire. The holding of office is not identified with interest, but is clearly distinguished therefrom."

From these premises, the court concludes:

"The loss of the assets of the corporation was due, not to the breach of the contract, but to independent acts of the appellants subsequent to such breach. The court was in error in instructing the jury so as to permit a recovery of this remote damage. We do not hold, nor is it to be implied, that the appellees have no remedy for such loss, but such remedy is not to be found in the case as now before us."

Our issue is not with the reasoning of the Court, but first, and chiefly with its above quoted premise, that "There was no duty upon the part of the appellants to restore to the appellees the management and control of the corporation"; and second: with, as we claim, its assigning a too narrow significance to the word "interest."

Counsel for the defendants and the court in its opinion both seem to limit the obligation of the defendants as accruing solely from the following clause in the contract:

"Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement."

It is our respectful contention that a contractual obligation to restore to plaintiffs the management of the corporation is clearly created by that portion of the contract immediately preceding the words just quoted, which does not appear to have sufficiently impressed itself upon the attention of the Court, especially when considered in connection with the entire contract and the attitude of the parties and the circumstances at the time of its execution.

We invite particular attention to the following provisions of the contract and circumstances at the time of its execution.

a. "Should they (defendants) fail or refuse to comply with all the agreements and stipulations herein mentioned, within the period aforesaid, then this agreement shall become null and void and of no effect; otherwise to remain in full force and effect."

b. "Whereas, the parties of the first part are desirous of securing the controlling interest of the said corporation and thereby obtain the full management of the affairs of the said corporation."

c. "The parties of the second part (plaintiffs) hereby agree to and with the parties of the first part (defendants) that the officers in the said corporation now representing the interest of the parties of the second part, shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire."

d. "The parties of the second part shall not be liable for any expense connected with the operation of this company excepting the expense of selling the stock held in trust for the parties thereto."

e. "The corporation, as testified to by Soto (R. p. 232), was managed and treated by the respective parties to the contract as a tenancy in common and working partnership and not as a corporation, one of such parties, to-wit, the defendants being the managing partners. Such testimony of Soto is to the effect that the monthly bills of the corporation were paid by himself, and that he sent two statements, one to the Ryans and one to Tevis and McKittrick, and that each of such parties thereupon furnished him with their respective proportions of such expense, the Ryans with four-sevenths and Tevis and McKittrick with three-sevenths thereof. Such advances were not regarded by any of the parties as loans to the company, and no evidences of any such indebtedness were issued by the company.

f. "The management of the property was regarded by all the parties as an important element and the subject matter of any negotiations that might be had between the respective interests."

From the foregoing we argue:

First: That it was the contractual duty of defendants to restore to the Ryans the management of the corporation.

Second: That the "interest" with which the Ryans were to be reinvested, if it did not mean property, certainly did mean more than "stock."

Immediately preceding the execution of the contract, the Ryans by reason of their independent contract with McPherson, at least believed that they were secure against his judgment and execution sale.

Their investment represented four-sevenths of one hundred and sixty thousand dollars. The interest of Tevis and McKittrick represented the remaining three-sevenths of such amount. All parties had confidence in the mines, and, apparently still have. Funds, however, were necessary to redeem the property from the execution sale and for further development. McKittrick believed that through the large wealth and the financial associations of Tevis, the defendants would be able to sell enough stock, not only to furnish the corporation with the funds which it required for corporate purposes, but also to reimburse to the respective parties the \$160,000 advanced. In order, however, that Tevis undertake to raise any money whatever, he required that he and his associate should have the absolute control of the corporation.

The unwillingness of the Ryans to make any contract yielded to their making a contract under the terms of which however, it was provided that if the plan of Tevis and McKittrick should, after two years, have failed in execution,

then, to use the words of the contract upon which as to this point we chiefly rely, "Then this agreement shall become null and void and of no effect; otherwise to remain in full force and effect."

We respectfully insist that those words expressed the essential feature of the contract and that they must be a factor in its interpretation. That their literal meaning was not the meaning intended is manifest. It was not intended that the contract should become null and void. The contract would only become null and void under a subsequent provision, to-wit: that Tevis within ten days should not have signed it.

It being plain then that the true meaning of such words was not their literal meaning, the question arises, what did they mean? To which question the only logical, reasonable answer is that, they mean that if such plan of Tevis and McKittrick should fail, it should be at the end of two years as if no such contract had been made. In other words that the status quo, precisely as it existed at the time of the execution of the contract, should be re-established—that the Ryans should be back where they were before they executed the contract. To re-establish substantially this status quo, insofar as the same might be possible, was therefore the contractual obligation of the defendants.

It being plain from the terms of the contract itself that one of its prime and essential features was the immediate resignation by the Ryans as officers and directors of the company, and the assurance to Tevis and McKittrick of their right to elect such officers as they might desire, it follows that such management was a substantial part of the status which Tevis and McKittrick were obligated to re-establish, and that therefore, the obligation of Tevis and McKittrick was (and this without respect to the meaning of the word "interest"), fourfold,

(1) To give the Ryans sufficient stock to make with what they already had, four-sevenths of the total capitalization, and

(2) To restore to them the management of the corporation.

(3) To apply proceeds of its sale of Treasury Stock to the indebtedness.

(4) To maintain the company free from debt.

It is true, as argued by the Supreme Court, that the words "Their interests shall reinvest" imply that such interest must have been one of which the Ryans either actually or in the opinion of the parties had been previously divested. But we respectfully urge that that of which the Ryans were divested was not only a portion of their stockholdings, but also the management and control of the corporation; that they were divested of such management and control by the express language of the contract itself; that that of which they were divested, to-wit, such management of the corporation, was something with which Tevis and McKendrick particularly insisted that they themselves should be invested. That the divesting of the Ryans and the investing of Tevis and McKittrick with such management, was, as has been argued, a substantial part of the contract itself, and that therefore, the reinvestment clause immediately succeeding the clause that the contract should, in the event of failure of the scheme, become null and void, meant neither more nor less than that the status quo should be re-established, and whatever may be deemed to be the precise meaning of the word "interest" in other places and in other documents, that in this particular contract it is plain that the parties intended by its use to comprehend all that which the Ryans by virtue of the contract were giving up, to-wit, both the management of the corporation and a part of their stockholdings.

At this writing we know of no case directly bearing upon the word "interest" in a corporation where either party has claimed that such word comprised its control and management. If those owning all of the stock of a corporation should contract to sell all of their right, title and interest in said corporation of whatever kind or character, to another set of parties for a certain amount, it would seem to us that they would be prohibited (assuming as is possible under the Arizona law that a director need not be a stockholder of a corporation) from maintaining for themselves the offices and directorate of the corporation against the wishes of the vendees under such contract.

The position of plaintiffs, however, is much stronger than such hypothetical case. The attending circumstances and the provision in the contract that it should become null and void, clearly indicate that in this particular case all parties intended that in the event of failure of the scheme the Ryans should be restored to the management, which was only given to Tevis and McKittrick in order to enable them to carry out such scheme, and to which they had no further right, and for which they had no further use, when, at the expiration of the two years allowed them, they themselves had become convinced that they were unable to accomplish the desired purposes.

In its opinion the Territorial Supreme Court said:

"The contract contemplated selling stock of the corporation to the public. It would have been impossible for the defendants, acting in good faith with the stockholders so secured, to have, upon the failure of their plans, divested the corporation of the title to the mines and invested appellees with a four-sevenths' interest therein. To hold that the contract required a return of a four-sevenths' interest in the property, would call for the assumption that the parties had in mind, if the scheme failed, that the appellants would

invest the appellees with title to a four-sevenths' interest in the property as against a corporation of which they were majority stockholders, as well as directors and officers. This would contemplate placing the appellants in a position where their pecuniary interest would clash with their duties."

We respectfully submit that the court misapprehended the position assumed by us and confused our contention as to the contractual right of the defendants with our contention as to the measure of damages. It was not our intention to assert: "That the contract required a return of a four-sevenths' interest in the property."

A liberal fulfillment of the contract would have been in almost any contingency impracticable. Specific performance in the event of the acquisition of rights of third parties, would for the reasons assigned in the quoted portion of the court's opinion, have been unreasonable and impossible. Of course, defendants were not bound by the contract to vest in the Ryans four-sevenths, or any interest in the property but they were contractually bound to do that which would make the interest of the Ryans substantially the same as it was at the time of the execution of the contract. The beneficial interest of the Ryans at that time, represented by the stock of the corporation, was four-sevenths of the property, less the amount of the indebtedness. In other words, while we do not contend that defendants were obligated under the contract to give to the Ryans four-sevenths of the property of the corporation, we do contend that under certain contingencies the giving to them a deed of four-sevenths of such property might have been substantial performance, and we further contend that under many contingencies, the giving them of enough stock of the corporation to make up four-sevenths of its capitalization would have been no performance whatever.

It is conceivable that they might have striven with the utmost energy and diligence to comply with the contract, and that still the corporation might, as heretofore said, have lost the property, and that the new owners of the same would have been unwilling to reconvey any portion of it to either plaintiffs or defendants. In such event the defendants would have been, through no wilful fault of theirs, unable to perform; but such inability would not have absolved them from their liability for breach; and we conclude that upon a breach of the contract, whether from the inability or unwillingness of defendants to comply with it, an action for damages accrued to the Ryans, and that the measure of such damages was a sum of money representing the substantial beneficial value of what they had at the time of the execution of the contract.

VII.

THE DEFENDANTS BREACHED THE CONTRACT BY SUFFERING THE CORPORATION TO INCUR ANY INDEBTEDNESS FOR THE DEVELOPMENT OR OPERATION OF THE PROPERTY IN EXCESS OF THE THIRTY THOUSAND DOLLAR NOTE TO TEVIS, THE ISSUE OF WHICH WAS ASSENTED TO BY THE RYANS.

The judgment of the Western Company under which the property was sold was forty-five odd thousand dollars. McKittrick's judgment for salary was something in excess of \$10,000. The property sold at the execution sale for the aggregate amount of the two judgments.

Of the \$44,000, thirty thousand dollars with interest compounded semi-annually at ten per cent per annum was an indebtedness incurred with the assent of the Ryans. This would amount to something less than \$37,000. The

balance of the judgment was for moneys borrowed by the corporation, and, as we shall endeavor to show, expended in violation of the contractual obligation of the defendants. The \$9,975 salary for which McKittrick recovered judgment, we also claim, was an obligation so incurred by the corporation in violation of such contractual obligation of appellants.

It is alleged in the complaint that the defendant McKittrick brought an action against the Turquoise Company for \$9,975 alleged salary, and recovered judgment in such action by default, for the sum of \$10,406. With respect to this judgment McKittrick testifies:

"I sold my judgment against the Turquoise Copper Mining and Smelting Company to the Western Company, and received the full amount of it from the Western Company. (R. p. 293.)

It was provided in the contract as follows:

"The parties of the second part shall not be liable for any expense connected with the operation of this company excepting the cost of selling the stock held in trust for the parties hereto."

Our contention is based upon the suggestion that the last quoted provision of the contract, considered in connection with the entire contract and the circumstances attending its execution, means that the appellants obligated themselves that the corporation should incur no indebtedness beyond that existing at the time of the execution of the contract.

The interpretation of such provision has been heretofore discussed.

It is obvious that it does not mean what its words literally express, for in such event it would be meaningless. Under no circumstances could the plaintiff have been liable for the expenses of the operation of the company,

and under no circumstances could the company be responsible for the expense of selling the 200,000 shares of stock held in trust by McKittrick, the ownership of the proceeds of whose sale was in the plaintiffs and defendants.

The fact that the expense of selling the trust stock manifestly chargeable to individuals and not properly chargeable to the corporation was nevertheless expressly excepted from the expense of the operation of the company, is proof conclusive that the parties did not intend by the words, "the expense of operation of the company," to mean, expense by the company, or expense which would be a liability of the company; and the same conclusion is equally inevitable from the first clause of the provision, to-wit, that the Ryans "should not be liable for any expense connected with the operation of the company," for the Ryans could not in any event have been so liable if by such expense had been meant, expense incurred by the company as its liability.

We must look therefore to all the circumstances of the transaction, to ascertain what the parties did mean by this provision.

The key to its interpretation is found in the fact that theretofore the expenses of the company had been borne by appellants and appellees in the ratio of three-sevenths to four-sevenths and that the corporation as an entity was not regarded by any of them as indebted for such advances. The parties had treated the corporation not as a separate legal entity, but as if it held the property in trust for the parties in the ratio of four-sevenths to the appellees and three-sevenths to the appellants. The expense of development and operation were not raised by the corporation but were paid voluntarily by the two sets of beneficial owners. Without suggesting that the corporation did not own both

the legal and equitable title to the properties, it is suggested as a means of interpreting the contract that the parties treated and regarded the property as if the corporation was holding it in trust for them. What the parties actually did mean by such clause was not that the Ryans "should not be liable for any expense connected with the operation of the company," but that no liability should be incurred by the corporation for the expenses of its operation. Moneys for the operation of the company should be raised if possible by the sale of the treasury stock; but if not raised by the sale of the treasury stock then if advances should be made, they should be made voluntarily as theretofore, and not as obligations against the company, and that the Ryans should not be responsible for their proportion of them. In other words, defendants could sell the 240,000 shares of the treasury stock, but they could not use one dollar of such money for development or operation until the indebtedness which was a menace to the property of the corporation should be entirely liquidated. After its liquidation, the proceeds of the sale of treasury stock, if any, might be used, to develop the claims owned by the company, but if prior to the liquidation of the indebtedness defendants in the exercise of their management should see fit to expend any money for development or operation, such moneys should be raised as they had theretofore been raised, by advances to the company in the nature of voluntary assessments, and that the Ryans should not be responsible for any portion thereof.

The crux of the contract as intended by the Ryans for their protection, was that debt which might jeopardize the value of the property should be rigidly guarded against. The existing debt should be paid and no further debt incurred. In other words the Ryans while without knowledge of the law or its phraseology or the proper functions

of corporations nevertheless clearly expressed their unwillingness to surrender their hold upon the property unless absolutely assured against loss of their interest, be it property or stock, by reason of the great menace of debt, and their determination to provide against the obligation to pay money which, when called for, might be unprocurable. The menace of debt was the same, whether it then existed or whether it should be incurred in the future, and to eliminate it was obviously the controlling feature of the contract.

The fact that McKittrick obtained judgment against the company for his salary in conjunction with the fact that the directors of the company, acting under the management of defendants allowed him such salary is proof that the corporation was actually indebted to McKittrick in the amount claimed; the suffering such indebtedness to be incurred was a breach of the provision of the contract under discussion.

We, therefore, respectfully submit that defendants breached the contract in four particulars:

First: By not applying \$8,000 proceeds from the first sale of treasury stock to the reduction of the indebtedness.

Second: By not applying the \$1,500 proceeds of the next sale of treasury stock to the reduction of the indebtedness.

Third: By incurring an indebtedness to McKittrick which resulted in the judgment for upwards of \$10,000, and an indebtedness to the Western Company in excess of the \$30,000 note with interest.

Fourth: By failing to re-invest the plaintiffs upon demand after the expiration of the two years.

The property having been sold under the two judgments owned by the Western Company, one of such judgments being as a direct result of the two first mentioned breaches of contract, for an amount \$9,500 with interest at the rate of ten per cent in excess of what it should have been; and the other of such judgments being entirely due to the breach of contract, and the direct result of such execution sale having been a damage to the company consisting of the value of the property found by the jury, as appears by arithmetical computation to have been \$231,000, it follows, as a matter of law, that the proximate result of each of such last mentioned breaches of contract was damage amounting to four-sevenths of such sum and that therefore, the instruction of the court as to the measure of damages was correct without regard to the interpretation of the reinvestment clause of the contract.

VIII.

THE INSTRUCTION UPON THE MEASURE OF DAMAGES DID NOT WITHDRAW FROM THE JURY ANY ISSUE OF FACT.

We will admit as laid down by Judge Taft in the opinion in the case of Weedon against Baltimore & Ohio R. R. Co., *supra*, that had defendants assumed the burden and offered proof that the property would have been sacrificed anyhow even had \$8,000 been applied to the liquidation of the indebtedness, such evidence would have been in mitigation of the damages, and would have created an issue which should have been submitted to the jury.

We submit, however, that there is no evidence whatever tending to establish that a diminution of the indebtedness to the extent of \$8,000 with interest could not have saved the property to the corporation. The Ryans might

have been able to raise sufficient money to have procured a redemption or to have bid at the execution sale if the judgment had been less by that amount; and the absence of any testimony showing that they would have been unable or unwilling to borrow or raise such amount is fatal to any possible suggestion, that there was an issue which the court improperly withdrew from the jury.

Moreover, no such matter was pleaded by the defendants or raised upon the trial; and even granting that it was unnecessary to plead it or raise it upon the trial and that there was sufficient evidence to constitute an issue which should have been submitted to the jury, the defendants while in their assignment of errors, specifying numerous reasons why such mooted charge was error, and not having assigned this reason, under all rules will be precluded from raising it at this time.

IX.

DEFENDANTS, HAVING WRONGFULLY WITHHELD THE MANAGEMENT FROM THE PLAINTIFFS WERE, AFTER THE DEMAND IN FEBRUARY, 1905, TRUSTEES BY USURPATION AND ARE RESPONSIBLE FOR DAMAGE TO THE PROPERTY WHICH OCCURRED DURING SUCH WRONGFUL TRUSTEESHIP.

The principle above stated pervades many branches of the law. In case of bailment entirely for the benefit of the bailee, such bailee is bound to exercise the most extraordinary care. When one holds property of another without any right whatsoever, his measure of damages is even greater. So in the case of a conversion, damage to the article converted is the loss of the wrongdoer with respect to the circumstances which gave rise to such loss.

"If the property is injured or suffers from any cause after the conversion, it is the loss of the wrongdoer and the owner may recover for it in trover."

4 Sutherland on Damages (3d Ed.), Sec. 1139, p. 3325.

"If the property after conversion be destroyed or taken by an officer on process against a third person, it is the loss of the wrongdoer."

Idem, p. 3326.

The same principle prevails in the case of a wrongful possession not amounting to conversion.

"In such a case the wrong done by the vendor is a wilful one, and the case is such as he has chosen to make it; hence his is the loss which may arise from the uncertainty pertaining to the nature of it and the difficulty of accurately estimating the results of his own wrongful act."

3 Sutherland on Damages, Sec. 658, p. 1914.

The same principle applies in the case of loss to an estate by an executor *de son tort*.

Tevis and McKittrick under this contract appointed directors of their own choice and ran the corporation's affairs as they chose.

In February, 1905, the company owned all of its property, which was worth, as found by the jury, \$270,000, and the Western Company held its notes for some thirty odd thousand dollars. It was their duty then to turn the management of the company over to the Ryans. They refused to do this upon demand, and suffered judgment by default to be entered against the company and all of its property to be sacrificed. To use the language of Sutherland, above quoted, the case was such as they chose to make it. Hence, theirs should be the loss.

X.

THE FINDING OF THE JURY THAT THE RYANS
MADE DEMAND FOR REINVESTMENT IS SUS-
TAINED BY THE EVIDENCE.

Upon the question of demand, the court instructed the jury as follows:

"Now, as I have already explained, the breach, if there has been any breach at all by Tevis and McKittrick, has been their refusal or neglect to reinvest the Ryans with the interest they formerly had in this company, upon proper demand having been made. If there has not been such refusal upon proper demand, then the plaintiffs in any event are not entitled to recover and you should find for the defendants. The plaintiffs are not entitled to recover unless they did make that demand within a reasonable time after the expiration of November, 1904. If demand was made by them in the early part of 1905—in the spring of 1905, that would have been sufficient time in which to make demand under the evidence in this case." (R. p. 321-2.)

The allegation of demand in the complaint was as follows:

"On the 15th day of February, 1905, plaintiffs informed defendants that they desired to be reinvested of their interest in the property of the said Turquoise Copper Mining and Smelting Company and that they desired to be restored to their interest in the property of said corporation the same as plaintiffs had prior to said 29th day of November, 1902, and plaintiffs informed defendants that they were then ready, able and willing to pay to defendants four-sevenths of the sum of \$25,262.60 paid to redeem the property of said corporation from the said sale of July 31, 1902, and said defendants ignored said request."

In their answer the defendants undertook to deny categorically each traversable allegation of the complaint. As to the averment above quoted, the denial was in the following language:

"Deny that plaintiffs ever informed defendants that they were at any time ready, able and willing to pay to defendants four-sevenths of \$25,262.60 paid by defendants to redeem said property from the sale of July 31, 1902, and deny that, as a matter of fact, plaintiffs ever were ready, able or willing to pay said, or any sum, for the purpose of redeeming said property."

It is submitted that this is in effect an admission of the demand for reinvestment and refusal, and this notwithstanding the following general clause at the end of the answer:

"For further answer in this behalf, these defendants deny all and singular the allegations in plaintiffs' complaint contained except as herein admitted, modified or explained."

Whether or no, however, the demand and refusal are admitted in the pleadings, the evidence heretofore quoted in the statement of facts is abundant to sustain the verdict. That the notice was in writing is apparent from the testimony; that it constituted a proper demand, follows necessarily from the following language of Jepp Ryan's with respect to its contents:

"I mean that we were ready to pay our part of the judgment that they bought and get the property back; that is, our four-sevenths interest." (R. p. 210.)

Moreover, it was not necessary that the demand should be in writing. Ryan's testimony is conclusive as to an oral demand. He said:

"At that conversation at the Hollenbeck I told Captain McKittrick we wanted our interest; wanted

to know what we were going to get out of it, and he said: 'You will be protected fully; Tevis will see that you are protected.' * * * I said, 'I don't want to start a suit but unless I get some satisfaction, I will start it.' " (R. 210-211.)

"The suit that I threatened to bring when I had the conversation with Captain McKittrick at the Hollenbeck was about that contract." (R. p. 214.)

XI.

THE WRITTEN DEMAND IN JULY, 1906, EXHIBIT "K," WAS SUFFICIENT TO CONSTITUTE BREACH OF CONTRACT.

The court instructed the jury substantially to the effect that a demand made in July, 1906, would have been too late. It is respectfully submitted that in this the court erred. As a matter of fact, such exhibit "K" constituted a timely and proper demand, and, inasmuch as the receipt of such demand by defendants was admitted, the plaintiffs were entitled to an instruction that the necessary demand had been made.

The authorities on the question of the time within which a demand under such circumstances must be made are collated by the Supreme Court of Michigan in the case of

Freeman vs. Ingersen, 143 Mich. 7, 106 Northwestern, 278, in which case the court says:

"We think that the rule supported by the greater weight of authority is, that where a demand is necessary to create a cause of action, such demand must be made within a reasonable time which, by analogy to the Statute of Limitations, will be deemed to be six years."

See also:

Meherin vs. San Francisco Produce Exchange,
117 Cal. 215; 48 Pacific, 1074.

Although the evidence is sufficient to sustain the finding of a demand upon Tevis, the demand upon McKittrick alone was sufficient.

Blood vs. Goodrich, 9 Wendell, 68;

Ball vs. Larkin, 3 E. D. Smith, 555;

9 American & English Encyclopedia of Law,
214, Note 2.

XII.

THE COURT DID NOT ERR IN THE ADMISSION OF EVIDENCE.

If the contract were unambiguous and therefore such as might not be varied by oral testimony and the construction placed upon it by the District Court or the Territorial Supreme Court were proper without respect to any oral testimony, then, of course, the admission of such testimony was not prejudicial error, unless, as stated by counsel for defendants, it tended to prejudice the jury.

If, on the other hand, the contract was ambiguous so as to call for the aid of oral testimony, then the admission of such testimony was not error at all.

We stand with confidence upon the position taken by the District Court, that the contract was free from ambiguity and that the interpretation given it by the District Court was correct, and that therefore the admission of the testimony if error, could not have been prejudicial, unless, as stated, it tended to prejudice the jury.

The testimony of Soto, a disinterested witness, was not objected to. It was as follows:

"I was present at the time the contract was made and signed, between Ryan Bros. and Captain McKittrick. I was present at the conversation between Captain McKittrick and the Ryans about the preparation of the contract; but I don't remember the facts—what the agreement was as to the contract to be drawn. But after we had the meeting I believe Captain McKittrick and Mr. Anderson (think that is the man's name), he is a printer and an attorney, he came up with this contract where we were having the meeting and the contract was read and I believe some objection was made by the Ryan Bros. to the contract about giving the control of the property to Mr. Tevis, and the captain said that Mr. Tevis was a very responsible man, being a very rich man, and that he would not have anything to do or sign any contract or have anything to do with any property except he had full control; the contract had been prepared then. I believe the first contract they prepared was not accepted and they drew the second one and the second one was accepted and signed. It was said by Captain McKittrick, if I remember, that if this certain amount of treasury stock was not sold within a certain time, I believe two years, if it was not sold the Ryan Bros. would be reinstated and placed back in the same position where they were before signing the contract." (R. pp. 230-231.)

This testimony was substantially the same as that of the Ryans, and therefore inasmuch as it was uncontradicted, their testimony added nothing whatever to it.

It would seem that the failure of counsel for the defendants to object to the introduction of this testimony disposed effectually of their contention that the admission of the testimony of the Ryans to the same effect was prejudicial error.

Of course if the evidence were admissible for the purpose stated, it could not be error to admit it, whatever may have been its incidental effect. But the sole purpose of the

evidence was, as stated, to aid in the construction of the language used in the written contract. ~~Argument in the original brief (pages 56 to 60)~~ This was a question of law for the court. The court did, in fact, construe the instrument and instructed the jury as to its meaning and effect. If the construction placed upon it by the court were correct, it is unimportant whether the evidence were admissible or not.

"When an instrument has been correctly construed according to its terms, it is harmless error to admit incompetent testimony to show its interpretation."

Taylor vs. Hodges, 105 N. C. 344, 11 S. E. 156.

But, say counsel, the evidence, though adduced to aid in the interpretation of the contract, was incompetent for that purpose, and although in effect withdrawn from the consideration of the jury, yet had a tendency to inflame the minds of the jurors, and this baleful effect was reflected in the verdict. Doubtless there are cases, most of them extreme in character, where the striking out of evidence, or instructing a jury to disregard it, or withdrawing it from their consideration, would not cure the error of its admission. Such, however, is not the ordinary rule. Jurors are presumed to be fair minded men and to heed the instructions and admonitions of the court, and it is only in extreme cases where an appellate court will presume otherwise. In the evidence complained of there is nothing that ought to inflame the most volatile mind. Without quoting the evidence, it will be seen from a perusal of it that there was nothing testified to that would create a prejudice in the mind of any fair minded man. Juries must be easily inflamed if the presumption is to be indulged in that particular. The use of the expression "multi-mil-

lionaire" will be discussed later, but aside from that there is nothing that can plausibly be claimed to be inflammatory.

The court having construed the contract, the question is whether its construction was correct, and having given to the jury instructions concerning its meaning, any error in the admission of evidence to explain its meaning became harmless. Even where evidence of a more harmful character than any contained in this record has been admitted, this principle has been applied.

Thus in *Allan vs. Steamship Co.*, 8 N. Y. Supp. 803, an action to recover damages by a passenger who had been furnished calomel instead of quinine, evidence was given that the ship's doctor was intoxicated after the injury. This evidence was held incompetent, but cured by an instruction that the plaintiff could not recover on account of any negligence of the doctor. More damaging evidence in such a case it would be difficult to conceive of, yet it was held that the instruction rendered the error in its admission harmless.

Moreover, the attention of the court was never called to any possible misconsideration of this evidence, and no instruction was asked limiting the consideration which the jury might give it. If counsel feared that the jury might (as now claimed), consider this evidence in determining the question of value, they should have asked an instruction limiting or explaining the purpose of the evidence or the purpose for which it might be considered. Not having done so, defendants may not now complain.

Ross vs. Lewyn, 5 Tex. Civ. App. 593, 24 S. W. 538.

Walker vs. Brown, 66 Tex. 556, 1 S. W. 797.

Shumard vs. Johnson, 66 Tex. 70, 17 S. W. 398.

In their motion for rehearing, counsel for the defendants dwelt at length upon the testimony given by various witnesses to the effect that appellant Tevis was a "multi-millionaire," "a very rich man," etc. Four instances of this kind are pointed out. The first occurs in the testimony of Jepp Ryan. The witness was asked to state a conversation between appellant McKittrick and himself. (R. p. 204.) This question was not objected to and the witness was proceeding with his answer, when he was interrupted by counsel and some questions were put and answers given, and the witness was then asked to state the conversation as he was telling it before he was interrupted. To this question also there was no objection, and the witness proceeded to give the conversation, in which he stated that in the conversation McKittrick said that Tevis was a "multi-millionaire", and by putting him in control he would be able to handle it, etc. A motion was made by counsel for defendants at the close of this answer to strike "that" (obviously referring to the last sentence of the answer), on the ground that the contract speaks for itself, but no objection was made to the language given by the witness, and no motion to strike it out for any of the reasons now urged.

The second instance occurred in the testimony of T. C. Ryan (R. p. 217). This was given absolutely without objection or motion to strike it out, and was again a mere detailing of a conversation. The same witness (R. p. 217), testified that McKittrick in the same conversation, said that Tevis was a very rich man. The question to which this answer was given was objected to, but on a ground having no connection with this part of the answer, and there was no motion to strike it out.

The third instance complained of occurs at page 228 of the record. This, too, was given without any objection or motion to strike out.

The fourth instance is found in the testimony of the witness Soto. Here, again, the testimony related to a conversation in which McKittrick used the language referred to and was given without objection and was not assailed by motion to strike.

It would seem clear that defendants are in no position to raise any question as to this testimony. The fact that they made no objection, no motion to strike, no request for an instruction, and did not call the attention of the court or opposing counsel to any claimed objection to this language, ought to preclude counsel from the raising of any question now. Counsel evidently had no serious idea that the casual remarks given by these witnesses in detailing a statement made by one of the defendants would tend to inflame the jury, for they made no effort to rid the record of the language now complained of, nor did they ask the court to instruct the jury to disregard it or seek in any way to avoid the effect they now profess it had. The court below never was asked to make any ruling with respect to this language, and it is too late to raise the question for the first time in this court.

Moreover, to suppose for an instant that a jury could have been prejudiced by these casual statements, would be to impugn their intelligence. Juries, are presumed to possess ordinary common sense and no intelligent body of men could, from this record, be supposed to have been influenced to render a verdict by these casual and merely passing references. Few verdicts would stand if counsel's view should obtain, for it would be easy to read almost any record after a trial, and pick out some casual remark that

might be claimed to have had a tendency to inflame the jury. To conclude that these chance expressions actually led to a different verdict than would have been rendered had they been omitted is absurd. It might as well be claimed that the casual statement that McKittrick went into the Hollenbeck Hotel bar inflamed what prohibitionists may have been on the jury.

The Judge presiding at the trial would undoubtedly have granted defendants' motion for a new trial had there been any doubt in his mind as to whether the jury had been prejudiced by the testimony whose admissibility is assigned as error. The prospectus had already established the fact that Tevis was a man of large means, a fact in any event that is common knowledge on the Pacific Coast, and is not to his discredit.

It, moreover, was a material circumstance.

It was alleged in paragraph II of the complaint (R. p. 70), and was an issue in the action, and, moreover, was one of the circumstances attending the execution of the contract which was properly admissible. It was the fact that the defendants had financial associations superior to those of the plaintiffs which was the main inducement for the execution of the contract.

XIII.

THE COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF REYNAUD THAT McKITTRICK HAD TOLD HIM THAT HE (McKITTRICK), WAS THE OWNER OF THE TEJON MINING COMPANY.

This is argued with earnestness at pages 45 and 46 of defendants' brief.

There are two answers to the argument, both conclusive.

One is, that the objection to the testimony was qualified. It appears at page 242 of the record. The question was as to whether McKittrick had had any conversation with the witness about the ownership of the claims. The objection of defendants was "that title cannot be proven by the declaration of anyone." There can be no question but that the court properly overruled the objection based upon such ground.

The other answer to the argument is that the fact was alleged in the complaint, and that the defendants made no motion to strike the allegation. It was a direct issue and under the recognized practice, it is not error to admit evidence to sustain an immaterial allegation of the complaint if no motion to strike the same had been made. The proper practice is to move to strike out the allegation, and if such motion be denied to assign its denial as error.

"The rule is established by the unanimous decisions of the courts, as well as by the provisions, found in the codes, that the proper and only method of objecting to and correcting redundant, immaterial, or irrelevant allegations in a pleading, is a motion to strike out the unnecessary matter, and not a demurrer, nor an exclusion of evidence at the trial."

Pomeroy Code Remedies (4th Ed.), Sect. 446.

Dent vs. Railroad Company, 61 S. C. 329, 39 S. E. 527.

XIV.

THE ADMISSION OF THE DEMAND MARKED "EXHIBIT K" WAS NOT ERROR.

Counsel devote ten pages to this assignment. We see no force in their argument.

This written demand was alleged in the complaint and no motion was made to strike it out.

Had it not been admissible it would not have been prejudicial error. Every statement in it assigned by defendants at page 52 of their brief was proven conclusively to be true upon the trial by other evidence which was not objected to.

The contract had not been observed by Tevis and McKittrick. They had sold the treasury stock for a mere bagatelle, for it cannot be claimed that the proceeds were of the least possible benefit to the corporation. They had allowed the Western Company to obtain a judgment in Cochise County, for McKittrick himself went to Tombstone and procured the judgment to be entered, and they had allowed and caused McKittrick to obtain a judgment for salary because both of them voted at the directors' meeting held on the 12th of December, 1904, ratifying the sale, and in effect approving the judgment. Certainly none of the purposes of the contract had been carried out; for the indebtedness was greater than ever, and the 200,000 shares of trustee's stock were unsold, and Tevis and McKittrick had put it out of their power to comply with the contract, because they had become unable during their incumbency in the management of the corporation to invest plaintiffs with anything except some worthless stock.

We believe, moreover, that the proof of this written formal demand was in every respect proper and pertinent to the plaintiffs' case. It indicated clearly what they expected of the defendants, and it set forth, according to our notions, that which they were entitled to.

The conversation at the Hollenbeck Hotel between McKittrick and Jepp Ryan and the letter testified to by Ryan, which was sent to him, and a copy of which was not available at the trial were more or less informal.

We do not agree with the trial court that Exhibit K came too late to constitute a proper demand. Nor do we believe that the Ryans were obligated to bring action immediately after the expiration of the two years. They had the right to notify the defendants informally of their contractual obligation and to hope that the defendants would comply with them. When apprised that the property had been sold at execution, and that their stock was worthless and that a corporation organized by the defendants, was the owner of it, the proper thing for them to do was to make a formal demand setting forth their rights and to prove it when the allegation with respect to it was denied. It constituted the plain and unequivocal demand which, at page 95 of defendants' brief, it is argued was necessary.

XV.

THE AMOUNT OF DAMAGES DID NOT BECOME FIXED AT THE TIME OF THE DEMAND.

As has been heretofore argued, the turning over of the control and management by the Ryans to Tevis and McKittrick was an essential portion of the contract and it was their solemn duty to turn such management back to the Ryans at the expiration of two years upon the failure of their scheme. Every act which Tevis and McKittrick did after the demand, was a breach of the contract and for every such breach they were responsible in damages, and such damages were collectable in one action.

Wilcox vs. Executors, 4 Peters 172, p. 182;

Reformed Protestant Church vs. Brown, 54 Barbour 197.

"But when a party has distinct demands or existing causes of action growing out of the same contract * * * they must be joined; they constitute an entire cause of action or demand."

1 Sutherland, Sec. 110; 4th edition, p. 312.

Moreover, these several facts were alleged in the complaint and the evidence with respect to them was directly responsive to the issues raised by their denial in the answer. No motion was made to strike them nor was there any demurrer interposed on the ground of improper joinder of causes of action.

XVI.

THE DAMAGES FOR THE DESTRUCTION OF THE VALUE OF THE STOCK HOLDINGS OF THE RYANS WERE RECOVERABLE BY THE RYANS IN AN ACTION BROUGHT IN THEIR OWN NAME.

It was not necessary that an action for such damages should have been brought by the corporation or in its behalf. It is not necessary, in order that the appellees should recover of the appellants these damages that the appellants should have deliberately and fraudulently wronged or injured the corporation. It is not claimed that the appellants would have had a cause of action against the appellees for the value of their stock so rendered worthless if there had been no contract between appellees and the appellants. A cause of action by the corporation by reason of wrongful acts of directors is an entirely different one from the cause of action by appellees for the breach of a contract made by them. The authorities cited in appellants' brief at page 71 upon this point, to-wit,

Porter vs. Sabin, 149 U. S. 478;

Smith vs. Hurd, 12 Metcalf 371,

are both discussed in the opinion of the Circuit Court of Appeals of the Sixth Circuit delivered by Judge Taft in the case of

Ritchie vs. McMullen, 79 Fed. 522, at pp. 533, 534 and 535.

In such opinion it is stated, at page 533:

"It is undoubtedly true, as the Circuit Court held, that a stockholder, merely as such, cannot have an action in his own behalf against one who has injured the corporation however much the wrongful acts have depreciated the value of his shares."

And both Porter vs. Sabin and Smith vs. Hurd, *supra*, cited. The opinion then proceeds:

"But this principle has no application where the wrongful acts are not only wrongs against the corporation *but are also violations by the wrongdoer of a duty arising from contract or otherwise and owing directly by him to the stockholders.*"

The court then proceeds to further review the case of Smith vs. Hurd and shows the inapplicability of the principle of such decision.

XVII.

IF THE THEORY OF THE TERRITORIAL SUPREME COURT BE CORRECT THEN THERE WAS NO ERROR IN THE AMOUNT DIRECTED TO BE REMITTED.

The assignments of error in this court and the assignments of error and briefs filed by the defendants in the territorial supreme court indicate that no objection was made to the computation by the Territorial Supreme Court of the number of shares of stock to which the plaintiffs were entitled in order to constitute a reinvestment of their four-sevenths' interest.

It is contended in the brief of defendants for the first time that under the theory of the Territorial Supreme Court

the amount of stock required to be turned over to the McKittricks in order to constitute such four-sevenths, was not 291,928 shares.

It is claimed that in calculating the additional shares of stock to which the plaintiffs were entitled the 200,000 shares of stock issued to McKittrick Trustee, and the 240,000 shares of treasury stock will be deducted from the capitalization of the corporation.

We submit that this contention now presented for the first time should not be considered. This court has frequently held that it would not consider a point not raised in the court below.

Rogers vs. Ritter, 12 Wall. 317;

Wood vs. Weimar, 104 U. S. 786;

Springer vs. U. S., 102 U. S. 586;

U. S. Supreme Court Dig. (L. Ed.), App. and Err.,
Sect. 4507. et seq.

We have ordered the briefs filed by defendants in the Territorial Supreme Court to be certified to this court in order to show that the point was not raised in that court. As has been heretofore stated, under the Arizona statute, assignments of error are a part of the appellant's brief.

Both parties moved for a rehearing after the decision of the Territorial Supreme Court. At that time the plaintiffs had the election to accept a new trial or to file a remittitur. They filed the remittitur upon the theory not disputed by the defendants in either their assignments of error and original briefs or upon their motion for a rehearing, that if the additional stock to make up four-sevenths should constitute the measure of damages such 291,928 shares were the proper number of shares. The defendants therefore should not be permitted now to raise the question.

Furthermore we submit that even under the theory of the Territorial Supreme Court such 200,000 shares issued to McKittrick and 240,000 shares of treasury stock should not be deducted from the total capitalization. With respect to the 240,000 shares of treasury stock this proposition is manifest. The plaintiffs had no interest in it. The title of the purchaser was an indefeasible one.

The 200,000 shares of stock issued to McKittrick, Trustee, by the terms of the contract, which the defendants claim they have never breached were unavailable to the plaintiffs. McKittrick had it and he had the right to vote it and it might not be sold except at par and it might be distributed only after enough of it had been sold at par to pay off the \$160,000 which the parties to the contract had advanced. McKittrick had no authority under the contract to deliver it or any part of it to the plaintiffs. While the plaintiffs had a right to the proceeds of it if sold, and a contingent right to some portion of it, they had no right which a court of equity would have recognized under the terms of the contract. Moreover they had no right, so long as it remained unsold, which will be forever, to sell their 279,500 shares.

XVIII. INTEREST.

It appears by the record as set forth in our statement of facts that judgment was rendered in the District Court in December, 1908, for \$132,000, which, in accordance with the judgment of the Territorial Supreme Court, should have been \$67,435.39; that the plaintiffs remitted \$64,564.63 in order to reduce the judgment to the amount, which, according to the theory of the Territorial Supreme Court, it should have been.

It also appears (R. 367), that on the 9th day of November, 1911, nearly seven months after plaintiffs had filed their remittitur, one of the attorneys for the defendants, proceeding apparently upon the theory that an additional final judgment should be entered by the Territorial Supreme Court, moved the court to enter such final judgment. That such motion was made without notice to the attorneys for the defendants, and that on the following day, the 10th of November, 1911, the court signed a judgment which appears at page 368 of the record. Such judgment is for \$67,435.39, but omits all mention of interest.

It does not appear upon the record that a copy of it, or notice of its entry was ever served upon the attorneys for the plaintiffs, and we state in this brief, although that is not in the record, that we had no notice of such judgment, and of the omission of the interest, until within a few days prior to the filing of this brief, when we observed it in the transcript of record in our work of preparation.

This is an obvious inadvertence of the court and the attorney for the defendants. We think it probable that the Supreme Court of Arizona would correct it, but we also submit that it is within the power of this court to correct it. If this court should affirm the judgment and say nothing upon the subject in its opinion, or direct anything upon the subject in its mandate, the Supreme Court of Arizona might infer that it had no power to correct the error after the decision of this court in the premises. In any event, unless this court makes some pronouncement upon the subject in its opinion or direction in its mandate the defendants will probably appeal from any order that the Supreme Court of Arizona might make correcting the error.

The result would be that the plaintiffs would be required either to wait for several years until such appeal

should be determined by this court or else by accepting the amount prescribed with interest from the 10th day of November, 1911, take the chances by such acceptance of waiving their right to the interest between the date of the entry of the judgment in the District Court and the 10th day of November, 1911, which amounts to something in the neighborhood of \$12,000.

We therefore respectfully petition this court to correct this error in its mandate; or else in its opinion to indicate the authority of the Supreme Court of Arizona to do so, in the event that it should arrive at the conclusion that the omission of the interest had occurred through error or inadvertence.

XIX.

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

We appreciate that the plaintiffs voluntarily remitted \$64,564.63. As a matter of law and justice they were entitled to it. They have not appealed to this court from the judgment of the Territorial Supreme Court.

Nevertheless, we earnestly submit that the Territorial Supreme Court erred in not affirming the judgment of the District Court.

The plaintiffs were confronted with a condition. Had they failed to remit this large sum of money to which they were entitled, then a new trial would have been had. The law of the case would have been established for the District Court by the decision of the Territorial Supreme Court, and upon such new trial plaintiffs necessarily could not have recovered assuming that the jury would have found the value of the property to be \$270,000, a greater amount than the \$67,435.39.

The only remedy of the plaintiffs would have been to have refused to accept such amount, and to have appealed to the Territorial Supreme Court, which court following its decision, would have decided against the plaintiffs and affirmed the judgment. The plaintiffs then would have found it necessary to appeal to this court, and if we are correct in our contention that the instruction of the trial court as to the measure of damages was the law, this court would have reversed the judgment and ordered a new trial. As a matter of fact plaintiffs' appeal could not have reached here until probably two years after the present time. Success therefore would have meant that the plaintiffs would have a new trial with the law, of course, established, in the neighborhood of March, 1916, and had the defendants continued to appeal, would not have been able to obtain a final judgment and get their money before 1920.

Under these circumstances the plaintiffs remitted. We admit that it was their voluntary act.

It is possible that this court will determine that there is no legal way in which plaintiffs can escape the results of such voluntary act.

Isaac, the Jew, gave his purse of byzants to Prince John at the tournament at Ashby. He afterwards exclaimed to his daughter, "Oh, Jacob, fifty zechins wrenched from me at one clutch and by the talons of a tyrant," to which one of the most exalted of the heroines of romance replied: "But father you seemed to give the gold to Prince John willingly." Whereupon Isaac said: "Willingly? I? The blotch of Egypt upon him! Willingly, saidst thou? Ay, as willingly as when in the Gulf of Lyons I flung over my merchandise to lighten the ship while she labored in the tempest, robed the seething billows in my choicest silks, perfumed their briny foam with myrrh and aloes—enriched

their caverns with gold and silver--and was not that an hour of inconceivable misery, though mine hand made the sacrifice?" So was it with the plaintiffs.

We repeat, we have not appealed from the judgment of the Territorial Supreme Court and perhaps are bound by our remittitur.

At the same time the defendants filed their petition for writ of error. They prayed that a writ might issue out of this court to the Territorial Supreme Court directing the clerk thereof to send the record and proceedings of the cause here in order that errors might be reviewed and corrected according to the laws and customs of the United States.

Upon such petition an order was made that a transcript of the record and all proceedings and papers in the cause be made and transmitted to this court, and the record and papers are here. If this court upon the examination of such record and proceedings should conclude that the verdict and judgment of the District Court were in accordance with law and justice, we submit that it has the power to affirm it, and we respectfully ask that it so do.

CONCLUSION.

Taking this entire contract into consideration, bearing in mind the importance attached by both parties to the control of the corporation, the method in which the corporate affairs and operations were conducted, the fact that the parties treated the corporation not as the owner of the property and responsible for its management but as if it held the naked title thereto in trust for parties who thus assumed, in their respective proportions, the burdens of its management, the explicit provision that the first proceeds of treasury stock should be applied to the liquidation of the indebtedness, and when the parties came to the final clause defining their obligations and rights, the express provision that the Ryans should not be liable for any of the expense of the operation, supplemented by the firm pronouncement that if Tevis and McKittrick should fail in any particular, the contract should be null and void, and of no effect, and then, that the interest of the Ryans should reinvest; and considering it furthermore in the light of all the circumstances attending the execution, and of the further fact that it was drawn by laymen, inexpert in any of the technical requirements of legal documents, it seems plain to us that the minds of the parties met upon clear and unambiguous propositions and that the fundamental notion of all of them, at which the expression of each inartistic sentence was plainly aimed, was that if the rosy colored anticipations depicted by McKittrick should prove evanescent, the Ryans if not bettered, should at least not be damaged by their acquiescence in his proposition; that the status quo should be re-established and that Tevis and McKittrick would see to it that the Ryans were put back just where they stood at the time of the execution of the contract.

The Ryans carried out their part of the program in

every particular. They left Tevis and McKittrick a free hand. The two years passed, and we find the Ryans possessed of nothing but a lot of worthless paper, and the property owned by a corporation organized by Tevis and McKittrick.

The written offer of the Ryans on record in this court after the verdict that they would satisfy the judgment upon the receipt of a beneficial interest in the property, equivalent to that which they had at the time of the execution of the contract, is at least an evidence that the affirmance and enforcement of this judgment will work no hardship upon the defendants and that the property, still indirectly held by them, and acquired by them under the operations of this contract, and as a direct result of their breach of it, is regarded by them as a compensation for the amount of the judgment.

That the defendants from the outset whether willfully, or fraudulently or unintentionally were acting in reckless disregard of their contractual duties, cannot even be questioned; although obligated to devote the proceeds of treasury stock to the liquidation of the indebtedness they purchased, as McKittrick testified, a diamond drill with such proceeds within a month after the Ryans assented to the execution of the Tevis note. The evidence does not disclose a single instance in which Tevis and McKittrick gave to their obligations under this contract, the faintest attention, after the day upon which they held their first directors' meeting and assumed the management of the property and removed its books to California.

The books are barren of any case showing such a wanton neglect of contractual liability.

Tucson, Arizona, January 14th, 1914.

EUGENE S. IVES,
Attorney for Defendants in Error.

the surrendering parties be restored to the same proportionate interest in the property as they held prior to the making of the agreement. In affirming the judgment of the Supreme Court of the Territory of Arizona which has been reduced by remittitur, this court does not necessarily hold that the rulings of the court below were indubitably correct, and it also takes into consideration Rev. Stat. Arizona 1901, par. 1588, providing in substance that the trial court shall not be reversed for want of form if there is sufficient matter of substance in the record to enable the Supreme Court to decide the case upon the merits, and that excessive damages may be remitted pending the appeal.

This court is not lightly disposed to disturb the decision of a territorial Supreme Court turning, as it does in this case, largely upon local practice.

13 Arizona, 282, affirmed.

THIS action was brought by defendants in error against Tevis and McKittrick, two of the plaintiffs in error, in a district court of one of the counties of the then Territory of Arizona. The trial resulted in a verdict and judgment in favor of plaintiffs below for \$132,000. On appeal, the Supreme Court of the Territory held that because of error affecting the amount of the damages, \$64,564.63 of the verdict ought to be remitted, and that upon the filing of a remittitur judgment should be entered in favor of plaintiffs below for the remaining sum of \$67,435.37. 13 Arizona, 120. Both parties filed petitions for a rehearing, with the result that the court adhered to its former view. 13 Arizona, 282. Plaintiffs having filed the remittitur, judgment was entered in their favor for the last mentioned sum, and the present writ of error was sued out.

The controversy arises out of the following transactions. In the year 1902 plaintiffs and defendants were stockholders in an Arizona corporation known as the Turquoise Copper Mining & Smelting Company, which owned mining properties in Cochise County, Arizona. The stock consisted of 100,000 shares, of the par value of \$10 each, of which the Ryans together owned four-

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sevenths and Tevis and McKittrick owned three-sevenths. The Ryans were in control of the board of directors. About \$160,000 had been expended towards the development of the mines, and this had been contributed by the respective parties in proportion to their holdings of stock, plaintiffs having contributed about \$90,000, defendants about \$70,000. One Bryant had secured a judgment and levied execution upon the property of the company, under which the mines had been sold on July 30, 1902, to one McPherson, subject to redemption on or before January 31, 1903. In this situation of affairs plaintiffs met the defendant McKittrick in Wilcox, Arizona, on November 29, 1902, and, after some negotiation, a written contract was drawn up and by them signed. Defendant Tevis was not present at this meeting, and the agreement was made contingent upon his signing, as he did a few days later. It reads as follows:

"This agreement, made and entered into this 29th day of November, 1902, by and between W. S. Tevis and W. H. McKittrick, of Bakersfield, California, parties of the first part, and Jepp Ryan, T. C. Ryan, and E. B. Ryan, of Leavenworth, Kansas, parties of the second part,

"Witnesseth: That, whereas, the parties above mentioned represent all the stock in the Turquoise Copper Mining and Smelting Company, a corporation organized and existing under the laws of the Territory of Arizona, and doing business in Cochise County, Arizona, and

"Whereas, the parties of the first part now own and control three-sevenths of the capital stock of the said corporation, and the parties of the second part four-sevenths of the capital stock thereof; and

"Whereas, the parties of the first part are desirous of securing the controlling interest of the said capital stock of the said corporation, and thereby obtain the full management of the affairs of the said corporation;

"Now, therefore, in consideration of, that the capital

stock of the said corporation shall be changed from its original capitalization to one million shares of the par value of one dollar each share, and that 240,000 of said shares of said capital stock shall be placed in the treasury of the said company, to be sold in whole or in part by the said parties of the first part, at such price or prices as the board of directors of said corporation may deem advisable, and the moneys received from such sale or sales shall be used as follows: First, to pay off and liquidate a certain judgment held by T. B. McPherson, of Omaha, Nebraska, or his assigns, against the said corporation, in the amount of about \$25,532.47 dollars. Second, to use the next \$20,000 received from the sale of said stock to develop the claims now owned and controlled by this company; the parties of the second part hereby agree to and with the parties of the first part, that the officers in the said corporation now representing the interest of the parties of the second part shall resign from said office or offices, and allow the parties of the first part to appoint or elect such officers in their place and stead as they may desire, said second parties agree to give the parties of the first part as their interest in the said company, a total of 280,500 shares of the capital stock thereof, and the parties of the second part shall receive as their portion 279,500 shares of capital stock of the said company. That the remaining 200,000 shares shall be divided between the parties hereto in the proportion of 101,000 shares to the first parties, and 99,000 shares to the parties of the second part; said 200,000 shares shall be issued to W. H. McKittrick, as trustee for the parties hereto. All of the parties hereto agree to use their best endeavors to sell as much of the said last-mentioned shares as possible, at not less than par value, and the proceeds of any of such sales of said block of stock shall be divided pro rata among the parties hereto, until they have been fully reimbursed for the money they now have expended upon this property,

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amounting to about \$160,000, when the remaining shares shall be divided equally among them, according to their respective interests in the ratio aforesaid.

"It is further understood and agreed between the parties hereto that they shall not be allowed to sell any of their individual holdings of stock in this company until the block of 200,000 held in trust for all shall have been sold, or apportioned, as above set forth. The parties of the second part shall not be liable for any expense connected with the operation of this company, excepting the expense of selling the stock held in trust for the parties hereto. The parties of the first part shall have a term of two years in which to comply with all the requirements of this contract. Should they fail or refuse to comply with all the agreements and stipulations herein mentioned within the period aforesaid, then this agreement shall become null and void and of no effect, otherwise to remain in full force and effect. Should this contract be annulled by any failure of the parties of the first part to do any and all things herein required of them, then the interest of the second parties shall reinvest in them in the same proportion and ratio as they held and were possessed of at the signing of this agreement.

"It is further understood and agreed by and between the parties hereto that W. S. Tevis, not being present upon the signing hereof, that ten days' time be allowed him in which to sign and ratify the same. Should he fail or refuse to do so within the period above mentioned, then this instrument shall be null and void in respect to all parties hereto. All erasures and changes and interlineations were made prior to the signing of this instrument.

"Witness our hands, the day and year first above mentioned."

In accordance with the agreement, a reorganization of the company was effected, the Ryans resigned as directors, control of the directorate passed to Tevis and McKittrick,